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No. 84 - 273

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOSEPH H. RIDGE, EUNICE ROSS, RALPH H. SMITH, JR., AND J. WARREN WATSON, PETITIONERS,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, ET AL., RESPONDENTS.

SUPPLEMENTAL APPENDICES

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Eunice Ross, Pro Se
Ralph H. Smith, Jr., Pro Se
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15 pp

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J. FRANK McKENNA, JR., et al., Plaintiffs	:	
v.	:	No. 2626 C.D. 1978
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants	:	
FRANCIS J. CATANIA, et al., Plaintiffs	:	
v.	:	No. 101 C.D. 1981
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants	:	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, Plaintiff	:	
v.	:	No. 621 C.D. 1982
J. FRANK McKENNA, JR., et al., Defendants	:	

APPLICATION FOR APPROVAL
OF CONSENT DECREE

WHEREAS the above captioned consolidated actions (the "Litigation") were brought as Class Actions:

(a) by Plaintiffs, J. Frank McKenna, et al., on their own behalf and on behalf of all others similarly situated against defendants the Commonwealth of Pennsylvania, State Employees' Retirement Board (the "S.E.R.B."), et al. (the McKenna action);

(b) by plaintiffs, Francis J. Catania, et al., on their own behalf and on behalf of all others similarly situated against defendants, the S.E.R.B., et al. (the

"Catania action");

(c) by plaintiff, the S.E.R.B., against defendants C. Frank McKenna, et al., as individuals and on behalf of all others similarly situated (the S.E.R.B. counterclaim"); and

WHEREAS by Orders:

(a) dated July 23, 2979, Bowman, J., the court has determined that the McKenna action should be maintained as a Class Action on behalf of all state court judges who were serving and had ten or more years of state service as of June 22, 1972;

(b) dated November 29, 1983, Craig, J., the Court has determined that the Catania action should be maintained as a Class Action on behalf of all state judges who had not completed ten years of state service as of June 22, 1972 and who had taken office prior to March 1, 1974; and

WHEREAS, the Complaints in the McKenna action and in the Catania action allege claims for relief with respect to certain legislative action which adversely affected the judicial retirement benefits of the plaintiffs therein; and

WHEREAS, the Court granted relief to plaintiffs in both the McKenna action, 54 Pa. Cmwlth. 388, 421 A.2d 1236 (1980), aff'd, 495 Pa. 324, 433 A.2d 871 (1981), and the Catania action, ___ Pa. Cmwlth. ___, 455 A.2d 1250 (1983), the S.E.R.B. and all defendants, upon and subject to the following terms and conditions:

CONSENT DECREE

1. The provisions of the proposed Consent Decree attached hereto as Exhibit "A" are incorporated herein as though fully set forth in detail.

NOTICE PROCEDURE

2. (a) As soon as practicable after its execution, this Application shall be filed with the Court for an Order substantially in the form attached hereto as Exhibit "B" providing for notice to McKenna and Catania class members. The entry of such order shall be a condition precedent to any obligation to provide Notice of the Consent Decree, incorporated at paragraph 1 hereof, to each respective class;

(b) As soon as practicable after execution of this Application, the S.E.R.B. shall deliver the following information to respective Class Counsel for each Member of the applicable Class: name and address;

(c) the S.E.R.B. shall have sole responsibility for providing the information described in subparagraph 2(b) above, and shall be solely responsible for the accuracy thereof. In addition, the S.E.R.B. shall pay all costs incurred in providing such information;

(d) Respective Class Counsel shall have the sole responsibility for providing Notice to Members of each appropriate Class in accordance with the Order of the Court referred to in paragraph 2(a) hereof and shall, within three (3) days after the Notice has been mailed, serve and file an affidavit evidencing their compliance with this Order of Court;

(e) Where applicable, the Notice shall contain language advising members of a Class, that pursuant to Pa.R.C.P. 1711 they may exclude themselves from the binding effect of the Litigation by following the procedures set forth herein. The final date for submitting requests for exclusion shall be at least twelve (12) days following the date upon which the Notice shall be mailed to members of

the Class. Requests for exclusion shall be deemed to have been submitted when actually received at the address specified in the Notice.

FINAL ORDER AND JUDGMENT

3. If the Court approved the Application, the parties shall submit for entry by the Court a proposed Final Order and Judgment in the form annexed hereto as Exhibit "C" dismissing the Litigation as to all parties with prejudice, providing for a release of claims as specified in paragraph 8 hereof and providing enforcement of the Consent Decree.

PROCESSING AND DETERMINATION OF APPEALS

4. All proceedings with respect to the Consent Decree described by this Application and the determination of all controversies relating thereto, shall be subject to the jurisdiction of the Commonwealth Court of Pennsylvania.

FINALITY OF THE JUDGMENT

6. The Final Order and Judgment shall provide that any Class Member who fails to file a timely request for exclusion from the Class shall be forever barred from asserting any claims against the defendants, their subsidiaries, present and former officers and directors, heirs and personal representatives and successors in interest, which were or could have been alleged in the Litigation.

EFFECT OF DISAPPROVAL OR TERMINATION OF SETTLEMENT

6. If final approval of the settlement described in this Application is not obtained for any reason, all negotiations proceeding and statements made in connection herewith shall be without prejudice to any person, shall

not be deemed or construed to be an admission or concession by any party of any fact, matter or proposition and all parties to this Litigation shall stand in the same position, without prejudice, as if this Application had not been made or filed with the Court.

APPLICATION IS NOT AN ADMISSION

7. This Application and the proposed Consent Decree provided for herein, whether or not consummated, and any proceedings taken hereunder are not and shall not in any event be construed as or deemed to be an admission or concession by the patries, or any of them, of the truth of any facts alleged or the validity of any claim or defense asserted in the Litigation or of liability of any or all Class Members;nor shall they be construed by anyone for any purpose whatsoever as an admission, concession or presumption of any liability on the part of the Class Members or any of them, nor an admission by the respective parties or their Counsel that the consideration to be given hereunder represents the amount which could be recovered after trial.

RELEASE

8. Subject to the approval of this Application by the Court, plaintiffs for themselves, all Class Members and their respective heirs, executors, administrators, successors and assigns, hereby remise, release and forever discharge all of the defendants and each of them, of and from any and all manner of actions and causes of actions, suits, obligations, claims, debts, demands, agreements, promises, liabilities, controversies, costs, expenses, and attorneys' fees

whatsoever, whether based on any Federal or State law or right of action or otherwise, foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued, which the plaintiffs, the Classes, the Class Members or any of them ever had, now have or can, shall or may hereafter have by reason of, based upon, or arising from any fact, event, matter, transaction, subject, occurrence or omission alleged or which could have been alleged relating to the subject matter of the Litigation.

MISCELLANEOUS PROVISIONS

9. The undersigned counsel for plaintiffs represent that they have authorized by the plaintiffs on behalf of themselves indiviually and as representative of the resepctive Classes to execute this Application, and the undersigned Attorney General represents that he is authorized to execute this Application.

10. The headings in this Application are solely for the convenience of the counsel for the parties and the Court, shall not be deemed to be a part of this Application and shall not otherwise be considered in construing or interpreting this Application. This Application may be signed in counterparts which, taken together, may be considered a duly executed original.

11. This Application shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

12. It is the intention of the parties hereto that this Application shall be subject to, governed by, and construed and enforced pursuant to the laws of the Commonwealth of Pennsylvania.

13. All documents, papers and notices which are permitted or required to be delivered to the parties under this Application shall be deemed delivered to those parties when received by the parties' respective counsel.

WHEREFORE, the parties join and respectfully apply to the Court, upon Notice and hearing, to approve the Consent Decree and dismiss this Litigation with prejudice.

s/ Jerome J. Pottmeyer, III
John H. Bingler
Jerome J. Pottmeyer, III
THORP, REED & ARMSTRONG
Attonreys for the McKenna Class

s/ Henry T. Reath
Henry T. Reath
Dwight Reginald Whitt
DUANE, MORRIS & HECKSCHER
Attorneys for the Catania Class

s/ David H. Allshouse
William Rawls
David H. Allshouse
OFFICE OF THE ATTORNEY GENERAL
Attorneys for the S.E.R.B.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J. FRANK McKENNA, JR., et al., Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants	:	No. 2626 C.D. 1978
FRANCIS J. CATANIA, et al., Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants	:	No. 101 C.D. 1981
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, Plaintiff	:	
v.	:	No. 621 C.D. 1982
J. FRANK McKENNA, JR., et al., Defendants.	:	

ORDER WITH RESPECT TO
NOTICE, SETTLEMENT HEARING
AND ADMINISTRATION

Upon reviewing the Application executed on behalf of all parties in the above captioned

consolidated actions (the "Litigation"); upon consideration of all prior proceedings in the Litigation; having previously determined that the claims alleged in the Litigation should proceed on behalf of (1) all Pennsylvania state court judges who were serving and had ten or more years of state service as of June 22, 1972 (the "McKenna class") and (2) all Pennsylvania state court judges who had not completed ten years of state service as of June 22, 1972 and who had taken office prior to March 1, 1974 (the "Catania class"); and it appearing that all parties have agreed to a settlement and dismissal of the Litigation upon the terms (the "Consent Decree") set forth in the Application and that a hearing on the Consent Decree is necessary:

NOW, upon the application of all plaintiffs and all defendants, it is hereby ORDERED as follows:

1. In accordance with the terms of the Application, on or before December 23, 1983:

(a) Notice shall be mailed by first-class mail, postage prepaid, in the form annexed to the Application as Exhibit "B-1" ("Notice to McKenna Class Members") to all McKenna Class Members as their names and addresses appear on the records to be furnished by the S.E.R.B. defendants; and

(b) Notice shall be mailed by first-class mail, postage prepaid, in the form annexed to the Application as Exhibit "B-2" ("Notice to Catania Class Members") to all Catania Class Members as their names and addresses appear on the records to be furnished by the S.E.R.B. defendants;

2. Class counsel shall serve and file an affidavit evidencing compliance with the pro-

visions of paragraph 1 of this Order within three (3) days after the notice(s) are mailed.

3. The notice(s) specified in paragraph 1 of this Order are hereby found to be due, adequate and sufficient, the best notice(s) practicable under the circumstances and in full compliance with the notice requirements of Rules 1701-1716 of the Pennsylvania Rules of Civil Procedure.

4. The responsibilities and obligations of the parties with respect to compliance with this Order shall be as specified in the Application.

5. A hearing shall be held at 2 o'clock p.m. on January 6, 1984 in Courtroom No. 6, Old Federal Courthouse, Philadelphia, Pennsylvania to consider the fairness, reasonableness and adequacy of the Consent Decree and the dismissal of the Litigation ("Approval Hearing").

6. Any member of the classes may opt out and be excluded from the binding effect of the

Litigation by submitting a request for exclusion in accordance with the procedures set forth in the Application and in the Notice.

7. The Court expressly reserves its right to adjourn the Approval Hearing from time to time by oral announcement at any time during the Approval Hearing and to approve the Consent Decree at or after the Approval Hearing without further notice, with such modifications, if any, as may be agreed upon by the parties.

BY THE COURT:

NOTE: Exhibits "B-1" and "B-2" to this order are deleted inasmuch as they appear in this Supplemental Appendix as Appendix D and Appendix C, respectively.

(Letterhead, inside address & saluation omitted.)

December 22, 1983

N O T I C E

Re: McKenna, et al. v. State Employees' Retirement Board, et al. - No. 2626 C.D. 1978 - In the Commonwealth Court of Pennsylvania

This letter is to notify you of the terms of a proposed settlement of the outstanding issues in this lawsuit.

As you may remember, on July 16, 1981, the Supreme Court affirmed the Commonwealth Court's Order of October 23, 1980, which had granted plaintiffs' first Motion for Summary Judgment. Plaintiffs' first Motion for Summary Judgment had requested that the Commonwealth Court order defendants to "recalculate and pay the retirement allowances of the named and class plaintiffs in accordance with the 1959 Retirement Code and the constitutional provisions of the 1974 Retirement Code." Following the Supreme Court's affirmance of the Commonwealth Court's Order, we were unable to resolve with counsel for the State Employees' Retirement Board (the "Board") several issues concerning the computation of plaintiffs' retirement benefits. Eventually, the Board limited its contentions to assert that the Order of October 23, 1980

provides the justification for the Board to bill class members for additional contributions, based on the higher rate of contributions contained in the 1959 Code. The Board also claims interest is due from class members on the additional contributions.

Another issue remaining in this lawsuit deals with the claim for interest owed by the Board to plaintiff class members on the recalculated retirement benefits due. This claim for interest was made on behalf of plaintiffs in March, 1983 when an Application for the Payment of Interest Pursuant to the Order of October 23, 1980 was filed with the Commonwealth Court by plaintiffs' counsel.

The third issue remaining in this lawsuit involves plaintiffs' Application for the Award of Counsel Fees. This Application, filed in August, 1982, requests a fee award of $237,676.00. The Application also requests that the award is to be paid out of a common fund consisting of increased retirement benefits for class plaintiffs and other state employees who benefited by the Commonwealth Court's Order of October 23, 1980.

A concerted effect has been made over the past months to resolve these outstanding issues, and similar outstanding issues in the related case of Catania et al. vs. State Employees' Retirement Board, No. 101 C.D. 1981. The terms of the settlement has been negotiated with the Attorney General and authorized by the State Employees' Retirement Board. The settlement terms have also gained the approval of Governor Thornburgh.

The proposed settlement, as it affects the plaintiff class, provides:

(1) Payment of four per cent (4%) interest, compounded annually, will be made on the increased benefits due class members;

(2) Contributions will be made by members at rates established under the 1959 Code class-of-service multipliers, including interest at four per cent (4%), compounded annually; and,

(3) Attorneys' fees and costs will be paid by the Board, but may not exceed $150,000.00.

The settlement terms are more fully set forth in the proposed Consent Decree, a copy of which is enclosed for your review.

Under Rule 1714 of the Pennsylvania Rules of Civil Procedure, no class action may be settled without the approval of the Court after hearing. The Court must determine that the settlement is fair and reasonable and that it adequately protects the members of the class. The criteria employed by the Courts in making this determination have included the reactions of the class to a proposed settlement. Accordingly, please forward to us any written comments that you have concerning the proposed settlement terms. We, in turn, will submit these comments to the Commonwealth Court at the hearing scheduled for Friday, January 6, 1984 at 2:00 p.m. in Courtroom No. 6, 2nd Floor, Old Federal Courthouse, 9th and Chestnut Streets, Philadelphia, Pennsylvania.

Very truly yours,
THORP, REED & ARMSTRONG
s/ Jerome J. Pottmeyer
John H. Bingler, Jr.
J. Frank McKenna, III
Jerome J. Pottmeyer, III

ts
Enclosure

[Note: The proposed consent decree is Appendix G hereto]

December 22, 1983

NOTICE OF PENDENCY OF
CLASS ACTION AND PROPOSED SETTLEMENT
AND DISMISSAL OF CLASS ACTION

TO: State Trial Judges of Catania v. S.E.R.B. Class
FROM: Henry T. Reath, Esquire

RE: Catania v. S.E.R.B., No. 101 C.D. 1981 (Pa. Cmwlth.Ct.) S.E.R.B. v. Catania, No. 621 C.D. 1982 (Pa. Cmwlth.Ct.)

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS WILL BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION

Dear Judge:

This memorandum concerns the settlement of the outstanding issues in the Catania pension litigation.

As you may recall from the several reports made at Conference meetings, a comprehensive settlement of the Catania and McKenna cases was sought and has now been achieved. The terms of the settlement were negotiated and were eventually worked out with the Attorney General and, in July, 1983, were formally authorized by the State Employee's Retirement Board. The settlement has now been approved

by Governor Thornburgh, and a Consent Decree has been submitted to the Commonwealth Court for approval. All of you who are members of the respective classes are being given notice and the opportunity to opt out of the class.

A copy of the consent decree is attached. Because it is worded in the technical language of the pension law, it may not be readily comprehensible. This Memorandum of Notice will therefore attempt to spell out the terms of the settlement in a less technical way.

As background, both Catania and McKenna were actions designed to set aside the legislative reductions of 1959 Pension Code benefits that occurred in 1972 and 1974. In June, 1972, the Compensation Commission's Report "froze" pension benefits at the $30,000 salary base (for most C.P. Judges) even though the salary was raised that year to $40,000. In 1974, a new Pension Code reduced the multipliers--the pension percentage for each year of service--by one fourth, but allowed the pension base to equal "final average salary." This meant that instead of a pension of 70 percent after 20 years, a judge would receive 52.5 percent of his final salary.

The 1974 Pension Code also reduced contributions by one fourth. But its real effect was to reduce the value of a Judge's pension, using a final salary of $55,000 and again assuming some 20 years of service, by a net of more than $100,000, and, as indicated, with a much smaller monthly installment.

The Catania class included Judges with under 10 years of service as of March 1, 1974. The McKenna class included those with more than 10 years service by June 22, 1972.

Our Supreme Court had no problem with McKenna. Its unanimous decision was that McKenna class members had vested property rights in their pensions which could not be reduced by the legislators.

When McKenna was argued, the Supreme Court granted us leave to make an amicus argument, which we did. Later, it took plenary and, in effect, original jurisdiction of Catania, and we again presented argument on our motion for judgment. This time, the Court rules in favor of those with 10 years service prior to the effective date of the 1974 Pension Code--March 1, 1974--but divided three-three as to those with under 10 years service and remitted the case to Commonwealth Court. Judge Craig, in a powerful and thoroughgoing opinion, granted judgment for the balance of the class both on contract and constitutional grounds. The Attorney General's appeal from that decision was limited solely to what is known as the "equivalent contributions" issue, which is discussed below.

Because both Catania and McKenna were brought solely on the issue of pension benefits, two collateral questions were left unanswered. One involved the rate of a Judge's pension contributions, since both the Compensation Commission "freeze' and the 1974 Pension Code reduced contributions as well as benefits. The other was the matter of interest--interest on any contributions that would be due and on any unpaid benefits. In addition, since these were class actions, there were claims filed for attorneys' fees and expenses.

The settlement is based on the following.

1. The plaintiff classes concede the equivalent contributions' issue to this extent

   a) They agree that in return for the larger 1959 Pension Code benefits, they will pay the uncollected 1959 Pension Code contributions differential at some point in time in the future. This period dates back to June of 1972.

   b) Also, they will begin paying the increased rate under the 1959 Code as of January 1, 1984. That rate is 7.5 percent for those with 10 years service, as compared with 5.625 percent under the 1974 Code.*

2. As to interest, whether on the deficit in uncollected contributions or on unpaid benefits, it shall run at four percent per year.

---

*These figures do not include the 1.25 percent increase in pension contributions enacted in July, 1983. This increase is now the subject of a declaratory judgment and injunction action brought by other state employees and now pending before the Commonwealth Court.

3. All of the plaintiffs' attorneys' fees and expenses, for Catania and McKenna, not to exceed $300,000, shall be paid by the Retirement Board.

The payment of past uncollected contributions plus interest may be made at any time up to and including retirement.

It should be noted that the benefits and options of the 1974 Code, such as final average salary--three years instead of five --and Option 4--right to withdraw contributions on retirement--are not affected by the case decisions or the settlement. The $10,000 salary raise to begin in December, 1983, will have the effect of increasing pension benefits dramatically. Not only will final average salary be increased, but the value of a pension of a Judge with 20 years service will climb, based on $65,000 per year, as much as $125,000. The exact amount will depend on the Judge's age and total service.

The total fees of Duane, Morris & Heckscher for handling Catania will be well within the maximum limit set by the Commonwealth for reimbursement. Accordingly, since all of our fees, including the $22,500 billed and paid to date, will be met by the Commonwealth, at the time of settlement we will remit that $22,500 to the individual judges who paid those monies to our firm. Additionally, the Commonwealth has agreed to reimburse the Conference for the $7,500 bill which the Conference originally paid to Thorp, Reed & Armstrong.

On November 29, 1983 Judge Craig issued an Order certifying a Catania class consisting of all state judges who had not completed ten years of state service as of June 22, 1972 and who had taken office prior to March 1, 1974. Therefore, this Notice is sent to you under Pa.R.C.P. 1714.

Any member of this Class who desires to participate in the benefits of the proposed Consent Decree need do nothing and its provisions will go into effect for that member if the Consent Decree is approved by the Court.

Any member of the Class who does not desire to participate in the Consent Decree's benefits or to remain a member of the Class may request exclusion from the Class by writing to DUANE, MORRIS & HECKSCHER, 1500 One Franklin Plaza, Philadelphia, PA 19102, Attention: Catania v. S.E.R.B. Such requests for exclusion must be received on or before Wednesday, January 4, 1984 and must set forth your name, address and telephone number, and a request that you be excluded from the Class. Each Class Member for whom a proper request for exclusion is received by January 4, 1984 will be excluded as requested.

Any person excluded from the Class will not be entitled to participate in the benefits of the Consent Decree and will not be bound by any judgment which may be entered in the Litigation. No opinion or legal advice is given as to the effect of a person's exclusion upon either the claims and defenses resolved by the Consent Decree or the availability of

the Consent Decree's benefits. Nor is any opinion offered as to the consequences of opting out to the excluded member.

An approval Hearing under Pa.R.C.P. 1714 will be held in Courtroom No. 6 of the Old Federal Courthouse, 9th and Chestnut Streets, Philadelphia, Pennsylvania at 2:00 p.m. on January 6, 1984 to determine that the settlement and Consent Decree are fair and reasonable and that they adequately protect the members of the Class. The criteria used by the Court in making this decision include the reactions of Class Members to a proposed settlement. Accordingly, we invite you to contact us with any written questions or comments about the Consent Decree within twelve (12) days of the date of this Notice. We will submit these comments to the Commonwealth Court.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

FRANCIS J. CATANIA, ET AL.,	:	
v.	:	No. 101 C.D. 1981
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, ET AL.	:	
J. FRANK McKENNA, JR., ET AL.	:	
v.	:	No. 2626 C.D. 1978
STATE EMPLOYEES' RETIREMENT BOARD, ET AL.	:	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD	:	
v.	:	No. 621 C.D. 1982
J. FRANK McKENNA, JR., ET AL.	:	

CONSENT DECREE

All parties in the three (3) above-captioned cases, by their respective counsel, hereby enter into the following consent decree:

1. Four per cent (4%) interest shall be paid on the increased benefits and contributions.

a. The State Employees' Retirement Board ("S.E.R.B.") will pay interest at the rate of four per cent (4%) per annum on the increased benefits owed to all Catania and McKenna plaintiffs from the date the increased benefits were due until the date the increased benefits were or are paid.

b. All Catania and McKenna plaintiffs will pay interest at the rate of four per cent (4%) per annum on the increased contributions owed S.E.R.B. from the date the contributions were due until the date of retirement or satisfaction of the debt, whichever occurs first.

2. All Catania and McKenna plaintiffs will pay contirbutions under the 1959 Retirement Code class-of-service multiplier. They will make retroactive payments to cover the period that contributions were made at the lower 1974 Retirement Code class-of-service multipliers, in the manner set forth below. The Catania and McKenna plaintiffs shall receive all other increased benefits or options provided for under the 1974 Retirement Code.

a. Computation of the Contributions Increase for Retired Judges.

(1) Whenever the amount of benefits plus interest owed is greater than the amount of contributions plus interest owed, the amount of contributions plus interest owed is deducted from the present value of the member's benefit, if the member elected to withdraw total contributions or total accumulated deductions under Option 4. All future benefits are then paid from the adjusted present value.

If the member did not elect to withdraw total contributions or total accumulated deductions under Option 4, the amount of the contributions plus interest owed was deducted from the benefit lump-sum payment already made by S.E.R.B., in which case no adjustment of present value or future benefits is made.

(2) Whenever the amount of benefits plus interest owed is less than the amount of contributions plus interest owed the amount of contributions plus interest owed will be deducted from the benefit increase until the outstanding debt is paid. Once the debt is paid, the benefit will increase to the amount provided using the 1959 Retirement Code class-of-service multipliers.

b. Computation of the Contributions Increase for Active Judges.

All active Catania and McKenna plaintiffs will pay the increased contributions from January 1, 1984, on. The increased contributions plus interest debt may be satisfied either before or at retirement, whichever the member elects.

(1) The contributions plus interest debt may be satisfied at retirement by reducing the total amount owed from the member's present value. All future benefits will then be computed on the adjusted present value.

(2) If the member so elects, he/she may pay the contributions plus interest debt anytime before retirement.

3. Attorney's Fees

(a) S.E.R.B. will pay the reasonable attorneys' fees and costs for both the Catania and McKenna plaintiffs. S.E.R.B. will pay the attorney's fees and costs for both the Catania and McKenna plaintiffs for the period from the commencement of their suits through May 31, 1983, in the amounts set forth below. These figures were computed at each attorney's historical rates, with a 1.25 multiplier. Hours already spent in settlement negotiations

and all future hours will also be paid at historical rates, but a multiplier will not be applied. Attorney's fees and costs for Catania plaintiffs are capped at $150,000.00. Attorney's fees and costs for McKenna plaintiffs are capped at $150,000.00.

ATTORNEY'S FEES (WITH MULTIPLIER)
AND COSTS THROUGH MAY 31, 1983

PLAINTIFFS	ATTORNEY'S FEES	COSTS	TOTAL
McKenna	$151,423.43	$10,964.08	$162,387.51*
Catania	$ 80,940.22	$ 8,022.00	$ 88,962.22

b. S.E.R.B. will pay the $7,500.00 fee incurred by Catania plaintiffs for legal advice rendered by Thorp, Reed and Armstrong before the commencement of the Catania suit as a part of the attorney's fees and costs payable to the Catania plaintiffs. No multiplier shall be applied to the amount.

c. S.E.R.B. shall pay the attorney's fees and costs of the guardians ad litem.

*Capped at $150,000.00

s/ Henry T. Reath
Henry T. Reath, Esq. Date
Duane, Morris & Heckscher
Attorney for Catania plaintiffs

s/ John A. Bingler
John A. Bingler, Esq. Date
Thorp, Reed & Armstrong
Attorney for McKenna plaintiffs

APPROVED BY:

_____
J.

January 6, 1984

Date: January 6, 1984

s/ David H. Allshouse
David H. Allshouse Date
Deputy Attorney General
Attorney for Commonwealth of
Pennsylvania, State Employees'
Retirement Board

s/ LeRoy S. Zimmerman
LeRoy S. Zimmerman Date
Attorney General

s/ Dick Thornburgh
Dick Thornburgh
Governor

s/ David W. Craig
J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

FRANCIS J. CATANIA, ET AL.,	:	
	:	
v.	:	No. 101 C.D. 1981
	:	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, ET AL.	:	
	:	
J. FRANK McKENNA, JR., ET AL,	:	
	:	
v.	:	No. 2626 C.D. 1978
	:	
STATE EMPLOYEES' RETIREMENT BOARD, ET AL.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD,	:	
	:	
v.	:	No. 621 C.D. 1982
	:	
J. FRANK McKENNA, ET AL.	:	

OBJECTIONS TO PROPOSED CONSENT DECREE

AND NOW comes the undersigned, class action plaintiffs in the case of McKenna, et al v. State Employees' Retirement Board, et al, at No. 2626 C.D. 1978, and respectfully presents the following as their objections to the proposed Consent Decree:

I. OBJECTIONS TO PARAGRAPH 1 OF THE PROPOSED DECREE

1. The proposed imposition of interest at four (4) percent (or any other rate) on contributions is objected to as a deprivation of Objectors' rights under the Constitutions and laws of the United States of America and this Commonwealth inasmuch as no contributions are due and owing from Objectors and, therefore, no interest can be owed thereon.

2. The proposed imposition of interest at the rate of four (4) percent, compounded annually, on contributions stated to be owed by the Objectors to the State Employees' Retirement Board (S.E.R.B.) is objected to as unjustified in law or equity.

3. That to require Objectors to pay interest on contributions, assuming arguendo that they are owed, where the failure to withhold them was the result of an unconstitutional act by the defendants is an unjust burden on the Objectors without any basis in law or equity.

4. The Objectors object to the classification of the contributions as a "debt" as set forth in Paragraph 1(b) for the reasons set forth infra.

II. OBJECTIONS TO PARAGRAPH 2

1. Objectors state that they are not obligated to pay contributions to S.E.R.B., either retroactively or prospectively, under and in accordance with the Retirement Code of 1959 but rather they are only obligated to make contributions to S.E.R.B. in accordance with the Retirement Code of 1974.

2. That to require Objectors to make contributions in an amount greater than that which the law requires is in effect a diminution of their salary and the deprivation of their property rights contrary to the Constitutions and laws of the United States and this Commonwealth.

3. That, since the commencement of the above-captioned cases, the General Assembly of Pennsylvania

has passed the Act of 1983-31 which unconstitutionally attempts to impose upon the Objectors the burden of paying additional contributions to S.E.R.B. while keeping constant the benefits which the Objectors would receive in accordance with their judicially determined rights.

This Act results in a diminution of their salary and a deprivation of their rights contrary to the Constitutions and laws of the United States and this Commonwealth.

That the proposed decree states that the Objectors will pay "increased contributions from January 1, 1984, on.", thus obligating them to pay contributions which are in effect under the Act of 1983-31.

To order that the Objectors pay the increased contributions which would include the contributions under the Act of 1983-31 would be to impose an unconstitutional deprivation of their rights.

4. That no debt is owed S.E.R.B. by Objectors for contributions.

III. OBJECTIONS TO PARAGRAPH 3

1. Paragraph 3,c is objected to as being ambiguous. Objectors have been informed by class action counsel that Paragraph 3,c was intended to mean that S.E.R.B. would pay the fees of the guardian ad litem. However, it is contended by the Objectors that paragraph 3,c does not specifically so state.

WHEREFORE, for the reasons hereinabove set forth, the Objectors request your Honorable Court to:

1. refuse to approve the proposed Consent Decree; and,

2. grant the Objectors the opportunity to argue in person and/or by brief the legal contentions in support of thier objections.

s/ Ralph H. Smith, Jr.

Note: Formal Joinder in the Objections was filed with the Commonwealth Court by Joseph H. Ridge]

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J. FRANK McKENNA, JR., et al., Plaintiffs	:	
v.	:	No. 2626 C.D. 1978
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants	:	
FRANCIS J. CATANIA, et al., Plaintiffs	:	
v.	:	No. 101 C.D. 1981
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants	:	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, Plaintiff,	:	
v.	:	No. 621 C.D. 1982
J. FRANK McKENNA, JR., et al., Defendants	:	

FINAL ORDER AND JUDGMENT

The parties to the above captioned litigation (the "Litigation") have entered into a Consent Decree and have applied to this Court pursuant to Rule 1714(a) of the Pennsylvania Rules of Civil Procedure for approval of the Consent Decree and terms thereof. On December 22, 1983, the Court entered an Order scheduling a hearing for

January 6, 1984, at 2:00 p.m. to determine, inter alia, whether the proposed settlement and compromise set forth in the Consent Decree should be approved by the Court as being fair, reasonable and adequate and whether judgment should be entered thereon. The Court ordered that Notice of the Litigation and the hearing, in the applicable form attached to the parties' Application as Exhibit "B" ("the Notices"), be mailed by first-class mail, postage prepaid, on or before December 23, 1983 (1) to each person who was a state court judge who had ten or more years of state service as of June 22, 1972 (the "McKenna Class") and (2) to each person who was a state court judge who had taken office prior to March 1, 1974 and had not completed ten years of state service as of June 22, 1972 (the "Catania Class") as their names and addresses appear on the records furnished to counsel by the State Employees' Retirement Board (The "S.E.R.B."). It appears from the affidavits filed with the Court that the provisions of said Order as to Notice were complied with. Moreover, the hearing on the Consent Decree was duly held on January 6, 1984, at which time all interested persons were afforded the opportunity to be heard. The Court has duly considered all of the submissions and arguments presented with respect to the Consent Decree.

NOW, THEREFORE, after due deliberation, the Court hereby finds, concludes, adjudges and decrees that: The Consent Decree attached and incorporated in the Application is fair, reasonable and adequate, is in the best interests of the Classes and should be approved, especially in light of the complexity, expense and probable duration of further litigation, the substantial litigation conducted to date, the risks of establishing liability, and the reasonableness of the consideration to be given for the Consent Decree considering the range of possible

recovery and the attendant risks of litigation; that the notification provided for and given to the Classes constitutes the best notice practicable under the circumstances and is in full compliance with the notice requirements of Rule 1714 of the Pennsylvania Rules of Civil Procedure; that there is no just reason for delay in the entry of judgment as agreed upon in the Application and that entry of final judgment and final approval of the Consent Decree will settle all claims alleged in the Litigation between the plaintiffs and the Classes on the one hand and the defendants on the other.

The application and the Consent Decree are therefore approved and shall be consummated in accordance with the terms and provisions thereof. The Request for Clarification presented by counsel as "McKenna Exhibit No. 2" is incorporated by reference hereinto, and, as to the Classes in both cases, the clarifications stated therein are hereby adopted and affirmed.

It is further ORDERED, ADJUDGED and DECREED as follows:

1. All claims alleged in the Litigation are hereby dismissed, with prejudice, and the Objections presented January 6, 1984 by two McKenna Class members are overruled.

2. The prosecution in any jurisdiction by the plaintiffs, the Classes or any Class Member, or any of their heirs, executors, administrators, successors and assigns, of any claim, actions, cause of action, suits, or other matters released by paragraph 8 of the Application is hereby forever barred and enjoined.

3. Jurisdiction is hereby reserved to effectuate the purposes and enforce the provisions of the Application and all matters arising thereunder, until such time as the

Consent Decree has been fully consummated and administered, and each and every act agreed to be performed under the Application has been performed.

4. Any person on whose behalf a request for exclusion is timely filed, pursuant to the Notices, shall be excluded from the respective Class.

s/ Robert W. Williams, Jr., J.
ROBERT W. WILLIAMS, JR., J.

s/ David W. Craig
DAVID W. CRAIG, J.

DATED: January 6, 1984

[Note: The Consent Decree referred to in the above order has been deleted inasmuch as it is Appendix G hereto]

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J. FRANK McKENNA, JR., et al., Plaintiffs, vs. COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants.	)	No. 2626 C.D. 1978
FRANCIS J. CATANIA, et al., Plaintiffs, vs. COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants.	)	No. 101 C.D. 1981
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, Plaintiffs, vs. J. FRANK McKENNA, JR., et al., Defendants.	)	No. 621 C.D. 1982

APPLICATION FOR RECONSIDERATION IN ACCORDANCE WITH PA. R.A.P. 1701

TO THE HONORABLE, THE JUDGES OF THE COMMONWEALTH COURT OF PENNSYLVANIA:

The Application for Reconsideration of the undersigned respectfully represents:

1. That you Applicants are state court judges who had ten or more years of judicial and/or state service as of June 22, 1972, and who were less than sixty years of age on that date (McKenna

class members) and who are presently on active judicial service.

2. That sometime during the period from December 25, 1983 to January 1, 1984, Applicants received by mail from Thorp, Reed & Armstrong (professedly acting as attorneys for the McKenna class plaintiffs) a "NOTICE" (Exhibit "A" hereto).

3. That one of the Applicants hereto filed in the Office of the Prothonotary of the Commonwealth Court his "OBJECTIONS TO PROPOSED CONSENT DECREE" (Objections) (Exhibit "B" hereto) and, eo die, the other Applicant filed his joinder therein.

4. In response to an invitation contained in the Notice (Exhibit "A") a duplicate original of the Objections of Applicants was delivered to McKenna counsel for presentation to the Court.

5. Because Applicants were not informed, either by the Court's Prothonotary or class counsel of what action, if any, was taken by the Court on the proposed Consent Decree, or Applicants' Objections thereto, on January 18, 1984, they contacted the Prothonotary and were informed that the Court had entered a "FINAL ORDER and JUDGMENT" (Order) approving the proposed Consent Decree and dismissing, with prejudice, Applicants' Objections thereto.

6. On January 18, 1984, Applicants were furnished copies of the Court's Order and the incorporated and approved Consent Decree (Exhibits "C" and "D" hereto, respectively).

7. On January 25, 1984, Applicants received a copy of a document captioned "ORDER WITH RESPECT TO NOTICE, SETTLEMENT HEARING AND ADMINISTRATION" and it was on this date that they were first able to read the contents thereof (Exhibit "E" hereto).

8. On January 27, 1984, Applicants first received and read a document entitled "APPLICATION FOR APPROVAL OF CONSENT DECREE" (Exhibit "F" hereto).

9. That Applicants have been informed, believe and therefore aver that the Court on January 6, 1984, did not conduct an evidentiary hearing.

10. That Applicants have been informed, believe and therefore aver that the Court dismised their Objections without granting to them the opportunity to present argument, either oral and/or written, in support thereof as requested by Applicants.

11. That Applicants have filed with the appropriate office a Notice of Appeal to the Pennsylvania Supreme Court.

RE: DEFECTIVE NOTICE TO APPLICANTS

12. That the Order of this Court (Exhibit "C" hereto) states in part:

> "6. Any member of the classes may opt out and be excluded from the binding effect of the Litigation by submitting a request for exclusion in accordance with the procedure set forth in the Application and the Notice."

13. That Applicants did not receive a copy of the Court's Order containing the provisions as is set forth in paragraph 12 prior to January 18, 1984.

14. That the Notice that Applicants received from the McKenna class plaintiffs' counsel (Exhibit "A" hereto) did not advise Applicants of the "opt out" provision of the Court's Order.

15. That Applicants desire the opportunity to consider, as the Order so clearly contemplates, the possible benefits of remaining in the class as well as the possible benefits of opting out, an opportunity so far denied to them.

RE: COURT'S FAILURE TO CONDUCT AN EVIDENTIARY HEARING

16. That Pa. R.C.P. 1714 provides:

> "(a) No class action shall be ..., settled ... without the approval of the Court after hearing."

17. That the requirement that no class action shall be settled without a hearing implies that the Court should conduct an evidentiary hearing in order to determine if the settlement is in the best interest of all parties.

18. That the Court's Order entered without such a hearing has resulted in a deprivation of Applicants' rights - as well as the rights of other class members - to due process of law under the 14th Amendment to the United States Constitution and Article I, Section 11 of the Constitution of Pennsylvania.

19. That the Court's action in approving the settlement without a constitutionally adequate hearing has and will deny Applicants their property rights guaranteed by the Federal and State Constitutions and the laws enacted thereunder.

RE: DENIAL OF OPPORTUNITY TO PRESENT ARGUMENTS IN SUPPORT OF APPLICANTS' OBJECTIONS

20. That Applicants possessed constitutional rights under the Federal and State Constitutions to present arguments in support of their Objections which the Court was obliged to hear and consider.

21. That the right to argue and to have the Court consider these arguments in support of Applicants' Objections is essential where, as here, the Court heard no evidence before entering its Order.

RE: DENIAL OF PROPERTY RIGHTS WITHOUT DUE PROCESS OR DUE COURSE OF LAW

22. That the Notice which Applicants received was constitutionally defective in that:

a. it failed to permit Applicants sufficient time to consider and respond to the matters to be considered by the Court;

b. it failed to fully and adequately inform Applicants of the exact nature and extent of the document submitted to the Court and the Court's Order entitled, respectively,

(1) APPLICATION FOR APPROVAL OF CONSENT DECREE and

(2) ORDER WITH RESPECT TO NOTICE, SETTLEMENT HEARING AND ADMINISTRATION:

c. that the APPLICATION FOR APPROVAL OF CONSENT DECREE contained matters (e.g., a release) that went beyond the parameters of the Consent Decree of which Applicants were given notice; and,

d. Applicants were not fully apprised of the nature of the matter then pending before the Court or that was to be brought before the Court.

RE: COURT'S DECREE

23. The Court's Decree insofar as it affects Applicants is contrary to the Constitutions and laws of the United States and of this Commonwealth.

WHEREFORE, Applicants respectfully pray that the Court exercise its jurisdiction under Pa. R.A.P. 1701 and

1. reconsider its Orders entered in December of 1983 and January of 1984 and, after doing so, set them aside;

2. grant Applicants the opportunity to present argument in support of their Objections;

3. grant Applicants a reasonable period of time within which to consider whether or not to opt out of the McKenna class;

4. conduct an evidentiary hearing regarding the merits of settlement and the legality thereof;

5. declare the Applicants' contribution rate to be that contained in the 1974 Retirement Code; and,

6. declare that Applicants are not obligated to pay a penalty in the nature of interest.

s/ Ralph H. Smith, Jr.
708 City-County Building
Pittsburgh, PA 15219
(412)355-5446

s/ Joseph H. Ridge
526 Court House
Pittsburgh, PA 15219
(412)355-5653

[Note: Exhibits A, B, C, D, E & F to the above Application have been omitted inasmuch as they are Appendices E, H, I, G, D, & C hereto, respectively.]

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J. FRANK McKENNA, JR., et al., Plaintiffs,	:	
vs.	:	No. 2626 C.D. 1978
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants.	:	
FRANCIS J. CATANIA, et al., Plaintiffs,	:	
vs.	:	No. 101 C.D. 1981
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Defendants.	:	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, Plaintiff,	:	
vs.	:	No. 621 C.D. 1982
J. FRANK McKENNA, JR., et al., Defendants.	:	

O R D E R

PER CURIAM

NOW, February 16, 1984, upon consideration of the application of Ralph H. Smith, Jr. and Joseph H. Ridge for reconsideration, said application is denied, except that Ralph H. Smith, Jr. and Joseph H. Ridge may, within thirty (30) days of the date of this Order, elect to file with the Prothonotary of this

Court a written election to opt out of the McKenna class.

In addition to mailing copies of this Order to counsel of record, the Chief Clerk shall mail a copy of same to Ralph H. Smith, Jr. and Joseph H. Ridge.

CERTIFIED FROM THE RECORD

Feb. 17, 1984

s/ Francis C. Barbush
Chief Clerk

(SEAL)

IN THE SUPREME COURT OF PENNSYLVANIA

FRANCIS J. CATANIA, et al., Petitioners v. COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Respondents	:	
J. FRANK McKENNA, JR., et al., Petitioners v. COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al., Respondents	:	Nos. 16, 21, 22 W.D. Appeal Docket 1984
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, Petitioners v. J. FRANK McKENNA, JR., et al., Respondents	:	

RESPONDENTS' MOTION TO QUASH APPEAL

Respondents, the Commonwealth of Pennsylvania, State Employes' Retirement Board and the Executive Secretary to the State Employes' Retirement Board, pursuant to Rule 1972 (4), Pa. R.A.P., respectfully request this Court to quash the appeals filed by the Honorable Ralph H. Smith, Jr., Joseph H. Ridge, Eunice

Ross, and J. Warren Watson, on the grounds that they are moot. In support of this motion, Respondents assert as follows:

1. On February 1, 1984, the Honorable Ralph H. Smith, Jr. and the Honorable Joseph H. Ridge, Jr., filed a Notice of Appeal from the Commonwealth Court's January 6, 1984 orders that approved the Consent Decree in these class actions; overruled Judges Smith and Ridge's Objections to the Consent Decree; and dismissed the claims presented in these class actions with prejudice. (Exhibit A)

2. On February 6, 1984, the Honorable Eunice Ross and the Honorable J. Warren Watson filed identical Notices of Appeal from the same Commonwealth Court orders. (Exhibits A-2, A-3)

3. These appeals are moot in that four judges have already received all the relief that would be available to them on appeal.

4. As illustrated in paragraphs 5 through 10 below, Judges Smith, Ridge, Ross and Watson have already presented objections to the Consent Decree to the Commonwealth Court and have been afforded the opportunity to exclude themselves from the class when their objections were overruled.

5. Specifically, on January 5, 1984, Judges Smith and Ridge filed their objections to the Proposed Consent Decree. These objections were entered into evidence at the January 6, 1984 Commonwealth Court hearing on approval of the Consent Decree. (Exhibit B)

6. On January 6, 1984, the Commonwealth Court overruled these objections and approved the Consent Decree. (Exhibits C-1, C-2)

7. On February 6, 1984 Judges Ross and Watson filed a Motion to Join in Judges Smith and Ridge's objections to the proposed Consent Decree. (Exhibits D-1, D-2)

8. On February 13, 1984, Judges Smith and Ridge filed a Motion for Reconsideration of their proposed objections to the Consent Decree. (Exhibit E)

9. On February 16, 1984 the Commonwealth Court denied Judges Ross and Watson's Motion to Join in the objections to the Consent Decree. The Commonwealth Court also denied Judges Smith and Ridge's Motion for Reconsideration. (Exhibits F-1, F-2)

10. In its orders of February 16, 1984, designated Exhibits F-1 and F-2 herein, the Commonwealth Court granted all four judges the opportunity to opt out of their respective classes.

11. The Commonwealth Court's Order permitting the judges to exclude themselves from the binding effect of the Consent Decree renders the judges' request on appeal that they be relieved from the effect of that decree moot.

12. Moreover, acceptance of these appeals by this Court would serve no useful purpose in that if the judges stay within their classes, they will be bound by the decree below. If they opt

out of their class, they lack standing to challenge the merits of that decree.

WHEREFORE, the Respondents respectfully request that the notice of appeals filed by Judges Smith, Ridge, Ross and Watson be dismissed as moot.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: s/ Marybeth S. Christiansen
MARYBETH S. CHRISTIANSEN
Deputy Attorney General

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Dated: February 23, 1984

[Note: Exhibits B, C2, C2, E & F2 are omitted inasmuch as they are Appendices H, I, G, J & K hereto, respectively. Exhibits A, A2, A3 (copies of notice of appeal), D1 & D2 (Motions of Petitioners Watson and Ross to join in objections.) are omitted.]

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

J. FRANK McKENNA, JR., et al. v. COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al.	No. 16, 21 & 22 W.D. Appeal Docket 1984
FRANCIS J. CATANIA, et al. v. COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al.	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al. v. J. FRANK McKENNA, JR., et al. APPEAL OF JOSEPH H. RIDGE and RALPH H. SMITH, JR.	

APPELLANTS' ANSWER TO RESPONDENTS' MOTION TO QUASH APPEAL

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICE OF SAID COURT:

AND NOW comes the Appellants in the above-referenced appeals and answers the Respondents' Motion to Quash Appeal as follows:

1. Denied as stated. It is denied that the Appellants Ralph H. Smith, Jr. and Joseph H. Ridge filed a Notice of Appeal on February 1, 1984, but on the contrary, Appellants Smith and Ridge aver that they filed their notice on the date of posting, to-wit, January 30, 1984, with the United States Postal Service in accordance with Pa. R.A.P. 1101(b).

It is denied that Appellants Smith's and Ridge's appeal is limited to the order as set forth in Respondents' motion but to the contrary Appellants state that their appeal is from all those matters set forth in the Notice of Appeal.

It is denied that Exhibit A to Respondents' motion is an accurate copy of Appellants' Notice of Appeal in that it fails to contain the Proof of Service as did the original.

It is further denied that Appellant Ridge's name is Joseph H. Ridge, Jr., and it is further stated that the proper name of Appellant Ridge is Joseph H. Ridge.

2. Admitted with the qualification that the Notice of Appeal of Appellant Watson contained a Proof of Service.

3. Denied. It is denied that the referenced appeals are moot and to the contrary Appellants aver that this Court could grant them the following relief:

a. declare that the Commonwealth Court acted arbitrarily, capriciously and abused its discretion by

(1) failing to hold a hearing as required by Pa. R.C.P. 1714 in order to determine if the proposed settlement is in the best interest of all members of the class (See copy of transcript of proceedings before the Commonwealth Court, Appendix I hereto);

(2) failing to allow class members Smith and Ridge an opportunity to argue their Objections to the proposed consent decree (In this regard it is to be noted that the notice given to class members Smith and Ridge, - a notice the contents of which were approved by the Commonwealth Court in two (2) separate orders, - merely states "Accordingly, please forward to us (McKenna class members' counsel) any written comments that you have concerning the proposed settlement terms." (Appendix II hereto),

(3) failing to advise members of the class that there was presented to and considered by the Commonwealth Court an Application for Approval of Consent Decree (Appendix III hereto) which contains many matters of which the class members were not notified in the Court's approved notice or contained in the consent decree (e.g., the Application contains a release of all class representatives and their agents, etc. and in the Court's Final Order and Judgment (Appendix IV hereto) the Court approves the release and then goes on to enjoin all class members from bringing any action in any jurisdiction on matters covered in the release,

(4) failing to sustain the objections of class members Smith and Ridge to the proposed decree,

(5) failing to permit class members Watson and Ross to join in the objections of class members Smith and Ridge,

(6) failing to declare, as it so recently did, that provisions of the proposed consent decree were illegal,

(7) by ordering that any class member who decided to opt out would not receive any benefits of the proceeding (In this regard it is to be noted that the instant proceeding was an action for a declaratory judgment which resulted in the Commonwealth and Supreme Courts declaring the law of Pennsylvania. Having declared the law of Pennsylvania, the Commonwealth and Supreme Courts' statements of the law are available to all and not just to class members who did not opt out.).

(8) failing to give reasonable and adequate notice of the nature and extent of the proceedings before the Commonwealth Court (Appellants received notice sometime after the Christmas holidays and before New Year's Eve of the January 6, 1984 proceeding, a period of less than ten (10) days);

(b) remand the proceeding to the Commonwealth Court to determine the merits of class members Smith, Ridge, Watson and Ross' objections;

(c) assume jurisdiction over the class action and grant appellants the following relief:

(1) declare that they are only required to pay contributions based upon the contribution rate which the General Assembly established in the Retirement Code of 1974 rather than contributions based on the Retirement Code of 1959 (Long established law holds that a pension is not a gratuity but rather is compensation for services rendered. Judicial compensation may be increased by a reduction in the contribution rate.); and,

(2) declare that in the event that appellants must pay contributions according to the Retirement Code of 1959, that they are not required to pay a penalty in the nature of compounded interest when failure to withhold payments was the act of the respondents. Moreover, appellants aver that they are presently being prejudiced by the Commonwealth Court's decision since, without authority of law, the Respondents have in fact caused to be deducted from Appellants' salary for January and February 1984 contributions at a rate not authorized by law and they threaten to continue to do so in the future. This action, Appellants aver, is an illegal confiscation of Appellants' property without due course and process of law.

4. Denied. It is denied that "Judges Smith, Ridge, Ross and Watson have already presented objections to the Consent Decree to the Commonwealth Court. ..." On the contrary, it is averred that Judges

Smith and Ridge presented objections to the Consent Decree which were dismissed out-of-hand without permitting argument thereon and that Judges Ross and Watson requrested permission to join in these objections which was denied (See Respondents' Exhibit F1).

It is denied, as averred by Respondents, that Appellants "... have been afforded the opportunity to exclude themselves from the class when their objections were overruled." On the contrary, it is averred that when the Commonwealth Court dismissed Judges Smith's and Ridge's Application for Reconsideration without a hearing that in its order it stated that "... Ralph H. Smith, Jr. and Joseph H. Ridge may, within thirty (30) days of the date of this Order, elect to file with the Prothonotary of this Court a written election to opt out of the McKenna class". It is also averred that Judges Watson and Ross were granted leave to opt out.

5. It is admitted that on or about January 5, 1984, that Judges Smith and Ridge filed their Objections to the Proposed Consent Decree and to the extent that it is indicated in the transcript of the proceedings which is Appendix I hereto, it is admitted that their Objections were admitted at the proceeding before the Commonwealth Court on January 6, 1984. It is denied that there was a hearing on January 6, 1984 on the approval of the Consent Decree as is contemplated by the Pa. R.C.P. 1714. On the contrary it is averred that the transcript of the proceeding (Appendix I hereto) indicates

that counsel for the parties appeared and presented papers to the Court and that several judges (some class action representatives) appeared and indicated their personal feelings regarding the "settlement" in conclusionary legal terms without presenting any factual basis therefor. Additionally, it is stated that the Court in its decrees went far beyond the parameter of notice that was given to the class action members in that it considered and adjudicated matters of which the class action members were not notified (e.g., approval of the release and the entry fo the restraining order).

6. Denied as stated. It is admitted that the document attached to Respondents' motion as Exhibit C2 captioned "FINAL ORDER AND JUDGMENT" purports to have been executed on January 6, 1984, and that it states: "..., and the Objections presented January 6, 1984 by two McKenna Class members are overruled". (P. 3). It is denied that there is an exhibit attached to the Respondents' motion as served on the undersigned containing an Exhibit C-1 and for this reason no response regarding such exhibit can be made.

7. Admitted.

8. Denied. It is denied as stated by Respondents that on February 13, 1984 that Judges Smith and Ridge filed a Motion for Reconsideration of their proposed objections to the Consent Decree. On the contrary, it is averred that Judges Smith and Ridge filed their "APPLICATION FOR RECONSIDERATION IN ACCORDANCE WITH PA. R.A.P. 1701" and their application goes

far beyond the Court's refusal of their Objections to the Proposed Consent Decree. The Application goes to the totality of the proceedings before the Commonwealth Court. The Respondents' Exhibit E is not a complete presentation of the matters contained in Judges Smith's and Ridge's Application in that it omits the Proof of Service and the Preservation of a Federal Forum for the Disposition of Federal Rights.

9. Denied as stated. It is admitted that the Commonwealth Court denied Judges Ross' and Watson's request to join in the Objections to the Proposed Consent Decree. It is also admitted that the Commonwealth Court denied the Application of Judges Smith's and Ridge's Application for Reconsideration except that it permitted them a thirty (30) day period within which they could opt out of the proceeding.

10. Admitted. Moreover, it is averred by Appellants that the time period for election to opt out has not expired and, further, that Appellants have not made an election to opt out or not.

11. The mere fact that Appellants have been granted a limited time period within which to opt out does not make the issues raised by the referenced appeals moot. The issues are still viable issues for the Court's decision.

Appellants admit that in the event that they, or either of them, opt out then as to the parties opting out, the appeal would become moot.

12. Denied. It is denied that if Appellants stay within their respective classes that they "will be bound by the

decree below". The Appellants aver that they have a Constitutional right to appeal (Pa. Const., Art. V, §9) and that this right is recognized by the Supreme Court (Pa. R.A.P. 501) and only in the event that all of the appellate courts affirm the Commonwealth Court's orders will the Appellants then be "bound".

WHEREFORE, Appellants respectfully request your Honorable Court to dismiss the Respondents' Motion to Quash Appeal.

RESPECTFULLY SUBMITTED,

s/ Ralph H. Smith, Jr.
Ralph H. Smith, Jr.
708 City-County Building
Pittsburgh, PA 15219

s/ Joseph H. Ridge
Joseph H. Ridge
526 Courthouse
Pittsburgh, PA 15219

s/ Eunice Ross
Eunice Ross
802 City-County Building
Pittsburgh, PA 15219

s/ J. Warren Watson
J. Warren Watson
803 City-County Building
Pittsburgh, PA 15219

Note: Appendices II, III & IV to the foregoing Answer have been omitted inasmuch as they appear as Appendices E, G & I hereto, respectively. Appendix I (transcript) has been deleted.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

J. FRANK McKENNA, JR., et al.	)	
v.	)	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al.	)	
----------	)	No. 16, 21 & 22 W.D. Appeal Docket 1984
FRANCIS J. CATANIA, et al.	)	
v.	)	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al.	)	
----------	)	
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES' RETIREMENT BOARD, et al.	)	
v.	)	
J. FRANK McKENNA, JR., et al. APPEAL OF JOSEPH H. RIDGE and RALPH H. SMITH, JR.	)	

APPLICATION FOR RECONSIDERATION OF ORDER QUASHING APPEAL AND REQUEST FOR VACATION THEREOF

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SAID COURT:

The Petition of the undersigned represents:

[Appendix N]

1. That J. Frank McKenna, Jr. and Frederic G. Weir commenced an action for declaratory judgment and mandamus in the Commonwealth Court of Pennsylvania, at No. 2626 C.D. 1978, against the State Employees' Retirement Board, Richard L. Winter and Robert E. Casey (hereinafter the McKenna case).

2. That the Commonwealth Court of Pennsylvania, in accordance with Pa. R.C.P. 1710 certified the McKenna case to be a class action.

3. That in accordance with the decree of the Commonwealth Court of Pennsylvania and pursuant to Pa. R.C.P. 1711, the members of the McKenna case class were notified by letter dated September 7, 1979, of the commencement of the action and were advised that:

> "Under the provisions of the Pennsylvania Rules of Civil Procedure, you will be automatically included in the class of plaintiffs unless you file within a reasonable time with the Commonwealth Court a written election to be excluded from the class." (The full text of the notice is Exhibit A hereto).

That Pa. R.C.P. 1711 provides:

> "(a) Except as provided in subdivision (b) or as otherwise provided by the court, in certifying a plaintiff class or subclass the court shall state in its order that every member of the class is included unless by a specified date a member filed

of record a written election to be excluded from the class.

(b) If the court finds that

(1) the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation; or

(2) other special circumstances exist which are described in the order, the court may state in its order that no person shall be a member of the plaintiff class or subclass unless by a specified date he files of record a written election to be included in the class or subclass."

4. That the members of the McKenna case class action who are petitioners herein did not elect to opt out of the referenced action but rather decided to remain as members of the McKenna case class.

That during the years 1979, 1980, 1981, 1982, 1983 and 1984, the McKenna case class petitioners have been parties to the litigation.

5. That Francis J. Catania, et al., commenced an action in the Commonwealth Court against the Commonwealth of Pennsylvania, State Employees' Retirement Board, et al., (hereinafter Catania case) at No. 101 C.D. 1981, and this action was duly certified as a class action and the members thereof were notified of their right to opt out.

6. That the petitioner herein who is a member of that class did not opt out of the Catania case class.

7. That after the passing of time and the failure of the petitioners herein to opt out of the class actions, the petitioners became members of the class and entitled to have the case proceed in accordance with the laws of the United States and of the Commonwealth of Pennsylvania.

8. That the McKenna case and the Catania case have been consolidated along with the case of Commonwealth of Pennsylvania, State Employees' Retirement Board, et al., v. J. Frank McKenna, Jr., et al., at No. 621 C.D. 1982, in the Commonwealth Court of Pennsylvania.

9. That the class representatives in the McKenna case and the Catania case entered into an agreement with the defendants in their respective cases (and the plaintiff in the case at No. 621 C.D. 1982) whereby they would compromise the disputes set forth in the three (3) referenced cases and thus settle the rights and liabilities of the class members including the entry of a money judgment against the members of the respective classes.

10. That the members of the McKenna case were informed by their counsel of the proposed consent order and, in accordance with the order of the Commonwealth Court of Pennsylvania, were informed that if they had any comments regarding the consent decree, that they were to put them in writing, deliver them to the McKenna case class counsel and that they would be presented to the Court.

11. That petitioners, Smith and Ridge, filed objections to the agreement and the consent decree and requested that they be given the opportunity to present argument, oral and written, in support of their objections.

The other petitioners requested leave to join in these objections but this request was denied out-of-hand.

12. That the Commonwealth Court rejected "with prejudice" these objections without giving Objectors the basic and fundamental right to present argument in support thereof.

13. That the Commonwealth Court of Pennsylvania, without the benefit of a hearing at which sworn testimony was presented as required by Pa. R.C.P. 1714, entered a decree approving the proposed consent decree and proceeded to approve other matters not noticed to the class members.

14. That following the entry of the various decisions of the Commonwealth Court, the petitioners duly filed and perfected appeals with the Supreme Court of Pennsylvania.

15. That the appeals of the petitioners were as a matter of constitutional right (Pa. Const., Art. 5, Section 9) and not as a matter of grace by the justices.

16. That following the filing of the notices of appeal and the perfection thereof in accordance with the law of Pennsylvania, the respondents filed a motion to quash the appeal.

17. That the motion to quash the appeal avers in support thereof that:

> "4. As illustrated in paragraphs 5 through 10 below, Judges Smith, Ridge, Ross and Watson have already presented objections to the Consent Decree to the Commonwealth Court and have been afforded the opportunity to exclude themselves from the class when their objections were overruled.
>
> * * *
>
> 10. In its orders of February 16, 1984, designated Exhibits F-1 and F-2 herein, the Commonwealth Court granted all four judges the opportunity to opt out of their respective classes.
>
> 11. The Commonwealth Court's Order permitting the judges to exclude themselves from the binding effect of the Consent Decree renders the judges' request on appeal that they be relieved from the effect of that decree moot."

18. That the decree of the Commonwealth Court of Pennsylvania relative to the opt out provisions was and is illegal in that it conflicts with the provisions of the Pa. R.C.P. 1701, et seq.

19. That petitioners filed their answer to the motion to quash in which they denied the premise of respondents' motion.

20. That when petitioners decided not to opt out of the referenced proceedings in 1979, they in effect elected to remain in the class and as a member thereof they had a right to expect that the proceedings would be in accordance with the Constitutions and laws of the United States of America and of this Commonwealth.

21. That when this court granted movants' motion and quashed the appeal it deprived petitioners of the rights granted to them and protected by the Constitutions of the United States and of this Commonwealth in that:

a. the appeal was quashed without petitioners being granted the opportunity of presenting argument in support of their right to appeal;

b. that the premise of movants' motion to quash was legally defective in that the issues involved were not moot and that the order to opt out of the Court below was illegal and therefore void;

c. that petitioners have been denied their constitutional right to appeal; and,

d. the action of the Court was and is without basis in law.

22. That if the court fails to withdraw its order quashing the appeal and the order of the Commonwealth Court of Pennsylvania is permitted to stand, petitioners will be denied their rights as follows:

a. that a judgment was entered against them without the benefit of hearing based upon nothing more than a concerted action between the class representatives and the respondents which culminated in an agreement between the class representatives and the Commonwealth respondents to which the petitioners objected;

b. that petitioners have been subjected to an order resulting in a judgment against their property and a diminishment of their interest in the pension fund, without being given the most fundamental of constitutional rights, i.e., an opportunity to be heard, the right to present evidence, and the hope that both would be considered by the court; and,

c. that the petitioners have been deprived of their property without due process or due course of law contrary to the Constitution of the United States and of this Commonwealth.

23. That in order to provide petitioners with the basic, fundamental rights guaranteed to them by the Constitutions and laws of the United States and of this Commonwealth, it is essential that the court's order be rescinded, and petitioners be granted the opportunity to present argument on the motion and that the motion be dismissed.

WHEREFORE, petitioners request:

1. that the court reconsider its order quashing the appeal;

2. vacate the order quashing the appeal; and,

3. permit appellants their right to present argument on the motion to quash and the answer thereto.

RESPECTFULLY SUBMITTED,

s/ Ralph H. Smith, Jr.
Ralph H. Smith, Jr.
708 City-County Building
Pittsburgh, PA 15219

s/ Joseph H. Ridge
Joseph H. Ridge
526 Courthouse
Pittsburgh, PA 15219

s/ Eunice Ross
Eunice Ross
802 City-County Building
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s/ J. Warren Watson
J. Warren Watson
803 City-County Building
Pittsburgh, PA 15219

EDITOR'S NOTE

PAGES 68 thru end WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

J. Frank McKenna, Jr. et al., Plaintiffs *v.* Commonwealth of Pennsylvania, State Employees' Retirement Board et al., Defendants.

Public employees—Pensions—Legislation—Actuarial soundness—State Employees Retirement Code of 1959, Act 1959, June 1, P.L. 392—Judges—Contract of retirement—Vested right—Final Average Salary—Pennsylvania Constitution, Article I, Section 17—Impairment of contracts.

1. A public employee who has complied with all the conditions of eligibility to receive a pension cannot have his contract of retirement adversely affected by subsequent legislation, not even for purposes of actuarial soundness; the legislature's legal power to make adjustments for purposes of actuarial soundness must be confined to those employees who have not, as of the time of the adjustment, satisfied all the conditions of eligibility; and, even as to that class of employees, the government must show that the change reasonably enhances actuarial soundness. [350-1]

2. Once judges who began their public service under the pension provisions of the State Employees Retirement Code of 1959, Act 1959,

[Appendix O]

June 1, P.L. 392, have satisfied all of the conditions necessary to entitle them to a pension under that Code, that Code becomes their contract of retirement and they have a vested right to have their retirement allowances computed according to the formula mandated by that Code. [351]

3. Legislative provisions freezing the Final Average Salary upon which judges' pension benefits are computed or reducing the multipliers applicable to the Final Average Salary obviously diminish the benefits the judges are to receive under their contract of retirement, the State Employees Retirement Code of 1959, Act 1959, June 1, P.L. 392, and thus violate Article I, Section 17 of the Pennsylvania Constitution by impairing the obligation of contracts. [352]

Argued April 8, 1980, before President Judge CRUMLISH and Judges WILKINSON, JR., MENCER, ROGERS, CRAIG, MACPHAIL and WILLIAMS, JR. Judge BLATT did not participate.

Original jurisdiction, No. 2626 C.D. 1978, in case of J. Frank McKenna, Jr., an individual; on behalf of himself and all others similarly situated and Frederick G. Weir, an individual, on behalf of himself and all others similarly situated v. The State Employees' Retirement Board and Richard L. Witmer, in his capacity as Executive Secretary of the State Employees' Retirement Board and Robert E. Casey, in his capacity as Treasurer of the Commonwealth of Pennsylvania. Class action requesting determination of validity of legislative modifications of the state employees' retirement program. Plaintiffs moved for summary judgment. Held: Summary judgment for plaintiffs.

John H. Bingler, Jr., with him *J. Frank McKenna, III*, and *Jerome J. Pottmeyer, III*, of *Thorp, Reed & Armstrong*, for plaintiffs.

Raymond Kleiman, with him *Norman J. Watkins*, Deputy Attorneys General, for defendant, Commonwealth of Pennsylvania.

Thomas J. Mangan, Jr., with him *Judd N. Poffinberger*, and *David L. Feigenbaum*, of *Kirkpatrick, Lockhart, Johnson & Hutchison*, for Amicus Curiae, Pennsylvania Bar Association.

OPINION BY JUDGE WILLIAMS, JR., October 23, 1980:

This is a class action requesting this Court to determine the validity of certain legislative modifications of the state employees' retirement program or the validity of the administrative application of those modifications insofar as they relate to the retirement pensions of the named plaintiffs and others similarly situated.

The plaintiffs are two judges retired from the Court of Common Pleas of Allegheny County, the Honorable J. Frank McKenna, Jr., and the Honorable Frederic G. Weir. They originated this suit in this Court in November 1978 as an action in mandamus and for a declaratory judgment. The defendants are the State Employees Retirement Board, its Secretary and the Treasurer of the Commonwealth of Pennsylvania.

In July 1979, the plaintiff class was certified to consist of all state judges who were serving and had ten or more years of service as of June 22, 1972. The class was subdivided into two groups: (1) those who were sixty years of age as of June 22, 1972; and (2) those who had not attained that age as of that date.

The subjects of this class action are three retirement systems enacted or adopted by the state legislature between 1959 and 1974; (1) the State Employees Retirement Code of 1959 (1959 Code);[1] (2) the 1972 Commonwealth Compensation Commission Report imposing a "freeze" on the retirement base salary used

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[1] Act of June 1, 1959, P.L. 392, §§101 *et seq.*, 71 P.S. §§1725-101 *et seq.*

to compute the Final Average Salary upon which benefits are computed (1972 FAS freeze);[2] and (3) the State Employees' Retirement Code of 1974 (1974 Code).[3] The gravamen of the plaintiffs' action is that the 1972 FAS freeze and the interpretation of the 1974 Code by the State Employees Retirement Board have unconstitutionally, or otherwise unlawfully, impaired retirement rights and benefits conferred by the 1959 Code upon the plaintiffs and the class they represent. An answer was filed on behalf of all defendants.

As a result of a stipulation entered into by the parties all genuine issues of material fact were removed from the case. The plaintiffs then filed two motions for summary judgment under Pa. R.C.P. No. 1035, asserting that they are entitled to judgment as a matter of law.

The first motion for summary judgment requests this Court to declare unconstitutional the 1972 FAS freeze and the provisions of the 1974 Code which purport to reduce the multiples by which benefits are calculated. The plaintiffs aver that those provisions impair their pension rights in violation of their property and contractual rights as protected by Article I, Section 17, and Article V, Section 16, of the Pennsylvania Constitution; and as further protected by Article I, Section 10, the fifth amendment and the fourteenth amendment of the United States Constitution.

The second motion requests us to declare that the defendants have misinterpreted the 1974 Code in their application of it to the named and class plaintiffs. In that motion the plaintiffs aver that the 1974 Code actually retains the "retirement allowance multipliers of the 1959 Code for all judicial service *prior* to Janu-

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[2] The Report of June 22, 1972, froze the retirement base to the salaries existing prior to that date, and provided that those salaries shall be used to compute the "final average salary."

[3] State Employees' Retirement Code, 71 Pa. C. S. §§5101 *et seq.*

ary 1, 1973. It is further asserted, in that regard, that the defendants have and are improperly calculating the retirement allowances of the named and class plaintiffs by using "retirement allowance multipliers" which the 1974 Code makes applicable to judicial service *after* January 1, 1973.

In both motions for summary judgment the plaintiffs also pray for a writ of mandamus ordering the defendants to recalculate the retirement allowances of the named and class plaintiffs according to the plaintiffs' interpretation of the 1974 Code, and to pay to the named and class plaintiffs the difference between what they have received as allowances and what they should have received.

The state retirement scheme in effect prior to June 22, 1972, was the 1959 Code. The 1959 Code provided for the computation of retirement allowances by multiplying the judge's years on the bench times his Final Average Salary (FAS) times two different multipliers. For the judge's first ten years on the bench the multiplier .04 was used. For years after the first ten the multiplier .03 was used.

The 1972 report of the Commonwealth Compensation Commission, while recommending a salary increase to $40,000.00 for judges, also froze the FAS used in computing the retirement benefits at a judge's then existing salary level, which for most state judges was $30,000.00 annually.

In 1974 the legislature enacted a new scheme, the 1974 Code, which it made retroactive to January 1973. The 1974 Code lifted the 1972 FAS freeze but also reduced the multipliers which would be applied to the FAS in computing benefits: the multipliers were reduced from the .04 and .03 under the 1959 Code to .03 and .0225. The 1974 Code contained a "saving clause" which gave a judge the option of having his benefits calculated according to the system under the 1972 FAS

freeze, with the larger multipliers, instead of under the 1974 Code with the lower multipliers.

The effect of the 1972 retirement scheme and the 1974 scheme is illustrated by the following hypothetical example of a state judge who retired in 1977 after having served fifteen years on the bench.

	1959 Code	
First Ten Years	10 x $40,000.00 x .04	= $16,000.00
Remaining Five Years	5 x $40,000.00 x .03	= $ 6,000.00
Total		$22,000.00
	1972 FAS Freeze	
First Ten Years	10 x $30,000.00 x .04	= $12,000.00
Remaining Five Years	5 x $30,000.00 x .03	= $ 4,500.00
Total		$16,500.00
	1974 Code (Reduced Percentages)	
First Ten Years	10 x $40,000.00 x .03	= $12,000.00
Remaining Five Years	5 x $40,000.00 x .0225	= $ 4,500.00
Total		$16,500.00
	1974 Code (Saving Clause)	
First Ten Years	10 x $30,000.00 x .04	= $12,000.00
Remaining Five Years	5 x $30,000.00 x .03	= $ 4,500.00
Total		$16,500.00

It is clear from the above hypothetical that the application of the 1972 FAS freeze and both options under the 1974 Code reduced the retirement benefits or allowances which would have been provided under the 1959 Code. Therefore, we must reject the contention of the defendants that the pension allowance remained the same after the 1972 freeze and after the 1974 percentage reductions.

The issue that confronts us in this case is whether the Pennsylvania legislature had the legal power to so reduce the retirement benefits of the named plaintiffs and the class they represent. What we must decide is whether those judges who by June 22, 1972, had served ten or more years were entitled to have their retire-

ment allowances calculated according to the 1959 Code.[4] We start with the idea that retirement benefits, once deemed an extension of governmental grace, came to be viewed as a contractual consideration for employment and a means of securing and keeping public servants.[5]

In *Retirement Board v. McGovern*, 316 Pa. 161, 174 A. 400 (1934) the Supreme Court of Pennsylvania stated that benefits under the Retirement Acts, as to elective constitutional officers, are part of their salaries. In *McGovern* the Court further declared that until an employee has earned his retirement pay or until the time arrives that he may retire, his retirement pay is but an inchoate right; but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived: it has ripened into a full contractual obligation.

However, after recognizing the nature of retirement pay, the opinion in the *McGovern* case further stated that:

> The legislature may from time to time, within the confines of that established relation [employer-employee], alter, change, amend, and render intact the actuarial soundness of the system so as to strengthen its fibers in any way it sees fit.

Id. at 176, 174 A. at 407.

Although this language would suggest a plenary governmental power over the terms of retirement benefits, it must be noted that the Court expressly restricted this power by the *confines of the established relationship* between the employer and the employee, which

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[4] Under the 1959 Code, judges with over ten years service on the bench and who were sixty years of age or older were eligible to receive retirement allowances.

[5] *Commonwealth v. Walton*, 182 Pa. 373, 38 A. 790 (1897).

would include their established contractual relationship.

In *McBride v. Allegheny County Retirement Board*, 330 Pa. 402, 199 A. 130 (1938) the Court reiterated the principle that an employee's right to retirement pay vests once the conditions of the relevant retirement system have been met. In the *McBride* case, the Court emphasized that once the right to retirement pay vests, it cannot be changed by the legislature even to enhance the actuarial soundness of the retirement fund. The Court said of the government's power to make alteration for purposes of actuarial soundness:

> It may increase payments or require other actuarial changes to protect the established principal, *but as to employees who have through time built up or acquired their right to retirement pay, on the assurance from the government that it would be fully met, the government must understand that a definite fixed obligation has been assumed.* (Emphasis added.)

Id. at 408, 199 A. at 133.

Although in the *McGovern* case there is broad language concerning the government's power to make changes for purposes of actuarial soundness, the Court in the *McBride* case by the above language immunized vested contractual rights from the government's power of modification even for purposes of actuarial soundness.

Another decision indicative of the course judicial principle had taken was *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165, 97 A.2d 231 (1953). In that case the employee had, in September 1928, completed twenty years of service as a policeman with the City of Pittsburgh. He applied for his pension from the *city police pension fund.* In October 1928, he became an employee of Allegheny County in the capacity of a court officer. In January 1929, he was awarded

his police pension benefits. In his new job as a county employee he made regular payments into the *county* retirement fund, from October 1928 until he retired from that job in June 1952. When he applied for his *county* pension benefits his application was denied. The basis of the denial was a state statute enacted in 1937 which provided that no person, who at the time of his employment by a county, was receiving or eligible to receive a retirement allowance from the state or any other political subdivision, would be eligible to receive a retirement allowance from the county retirement system.

In *Baker* the sole question was whether the 1937 statute, an amendment of the state Retirement Act, enacted almost nine years after the claimant had become a county employee and had begun his payments into the county fund, was retroactive to the date he began his employment with the county, October 1928, to bar his right to a *county* allowance. The Supreme Court of Pennsylvania held that the 1937 statute could not in harmony with the Constitution of the United States or Pennsylvania have such an effect; for, such an effect would impair the obligation of contracts.

In so holding, the Court in *Baker* stated that once an employee joins a pension fund he has a right to continued membership therein, *under the same rules and regulations which existed at the time of his employment*, and that the right is complete and vested. From that principle the Court further declared that the legislature could not thereafter constitutionally alter the provisions of an already existing contract of membership. Said the Court, "[h]is rights in the fund could only be changed by mutual consent." *Id.* at 169, 97 A.2d at 233.

Carried on the current of the earlier decisions came *Hickey v. Pittsburgh Pension Board*, 378 Pa. 300, 106 A.2d 233 (1954). In that case our state Supreme Court,

per Justice MUSMANNO, struck a blow aimed at ending the lingering "remnant of the ancient idea that a pension is a manifestation of sovereign generosity."

In that case, employee Hickey had begun employment with the City of Pittsburgh in 1910. In 1915 the state legislature enacted a statute providing that any person so employed who shall have attained the age of sixty and have been employed for twenty years shall be entitled to the pension fixed by the statute.

In 1930 Hickey completed his twentieth year of employment with the City and thus was qualified under the Act of 1915 to receive his pension at age sixty. In 1933, three years after Hickey had satisfied the minimum tenure requirement, the legislature amended the Act of 1915. The amendment empowered the pension board of a city of the second class to suspend the payments to any pensioner who took employment with the state or federal government or with the county in which the city was located.

In January 1947, Hickey, having passed his sixtieth birthday retired from his City employment and began receiving pension payments of $126.36 a month, in accordance with the Act of 1915. But when, in February 1952, Hickey obtained employment with Allegheny County, the City pension board discontinued his pension payments on the authority of the 1933 amendment.

Hickey commenced an action of mandamus to compel the pension board to resume his payments regardless of other employment. Upon appeal from the lower court's dismissal of Hickey's complaint, the Supreme Court of Pennsylvania reversed.

In reversing, the Court held that Hickey's right to a City pension became vested in 1930 when he completed twenty years of service and had made all contributions required under the Act of 1915. The Court further held that the vested right was personal property held by the pension fund until Hickey reached

sixty years of age, and that the legislature could in no way diminish rights duly paid for in services and money.

Regarding actuarial considerations, the Court in the *Hickey* case declared that:

> The Legislature may strengthen the actuarial fibers but it cannot break the bonds of contractual obligations. *The permissible changes, amendments and alterations provided for by the Legislature can apply only to conditions in the future, and never to the past.* (Emphasis added.)

Id. at 309, 106 A.2d at 237.

The above emphasized language we interpret to mean that adjustments for actuarial purposes cannot be used to diminish the *rights* of those who became eligible in the past. In *Hickey* the Court stated with clarity and directness that the pensioner was entitled to be paid according to the contract created by the law in force when he became a member of the retirement system, the Act of 1915.

In the legal setting provided by the preceding decisional law came another significant pension case, *Harvey v. Allegheny County Retirement Board*, 392 Pa. 421, 141 A.2d 197 (1958).

The employee, Harvey, began working for Allegheny County in 1928. As of that time the Pension Act of May 8, 1919, was in effect. That act provided for contributions by county employees to the pension fund of 1% of their monthly salaries. In return, upon reaching fifty years of age after having been in the county employ for not less than twenty years, each employee became entitled to receive a pension equal to 50% of his average annual salary to a maximum amount of $100.00 a month. Five years after Harvey had begun his employment the legislature, in 1933, made substantial changes in the retirement system of Allegheny

County. The relevant changes were that the rate of employee monthly contributions to the fund was increased from 1% to 3%; and the age for voluntary retirement was increased to sixty years, except that an employee could retire with benefits after twenty years if he was separated from employment through no cause of his own.

Two years later, in 1935, the legislature again modified the retirement system by increasing the monthly contributions from 3% to 5%, and raised the maximum monthly amount of contributions payable to $10.00. Again, in 1947, the legislature further increased the maximum monthly amount of contributions from $10.00 to $15.00. Also, the monthly retirement allowance obtainable by an employee was raised from $100.00 to $150.00.

Harvey continued as an employee of the county until his dismissal in February 1951. At that time he was over fifty years of age and had been continuously employed by the county for almost twenty-three years. Thus, there was no dispute that he had fulfilled all requirements necessary to obtain the retirement allowance under the Act of 1919. It was also conceded that Harvey had complied with the requirements of later county retirement acts providing for increased rates and amounts of employee contributions.

Following his dismissal in 1951, Harvey applied for a retirement allowance. His application was denied on the ground that he had been dismissed for cause and that under the 1947 statute he was required to contribute to the pension fund until he attained sixty years of age, an age Harvey had not reached when dismissed.

Harvey commenced an action in mandamus to compel the county retirement board to pay him his retirement allowance from the date of his separation from county service. The plaintiff contended that his retire-

ment rights were controlled by the law in effect on the date of his original employment rather than the act in effect at the time of his dismissal.

The lower court determined that Harvey's *eligibility* was controlled by the Act of 1919, the law in effect when he entered county service. The lower court also determined that the *amount* of his retirement was governed by the Act of 1947, the law in effect at the time of his dismissal in 1951. It must be noted that when the Act of 1947 took effect Harvey had not completed twenty years of service with the county, but had at the time of dismissal. The lower court entered a judgment on the pleadings in Harvey's favor and issued a writ of mandamus directing the county retirement board to pay him all money due as a retired county employee as provided in the 1947 statute.

Upon appeal by the retirement board, the Supreme Court in the *Harvey* case reversed the lower court. The Supreme Court held that Harvey's retirement rights were governed by the change in the age of eligibility wrought by the Act of 1933; because as of the effective date of that act, Harvey had not attained eligibility to receive a pension.

In so holding, the Court in *Harvey* first reviewed the significant prior decisions on the issue. And then, based on those decisions, the Court summarized as follows the law relating to the rights of a public employee in a retirement system:

1. An employee *who has complied with all conditions necessary to receive a retirement allowance* cannot be affected adversely by subsequent legislation which changes the terms of the retirement contract.

2. An employee *who has not attained eligibility to receive a retirement allowance* may be subject to legislation which changes the terms of the retirement contract, if the change is a reasonable enhancement of the actuarial soundness of the retirement fund.

3. An employee who has *not* attained eligibility to receive a retirement allowance may not be subject to legislation which changes the terms of the retirement contract if the change does not reasonably enhance the actuarial soundness of the retirement fund.

In *Harvey v. Allegheny County Retirement Board* the Supreme Court of Pennsylvania articulated with clarity a principle less directly set forth in the *McBride* case: an employee who has complied with all the conditions of eligibility to receive a pension cannot have his contract of retirement adversely affected by subsequent legislation, *not even for purposes of actuarial soundness.* The legislature's legal power to make adjustments for purposes of actuarial soundness must be confined to those employees who have not, as of the time of the adjustment, satisfied all the conditions of eligibility. Even as to that class of employees the government must show that the change reasonably enhances actuarial soundness.

The decisional law that has been reviewed in this opinion, especially the *Harvey* and *McBride* cases, points commandingly to the conclusion that the plaintiffs are entitled to the declaratory and mandatory relief they seek. The named plaintiffs and the class plaintiffs as certified all commenced their public service as judges under the 1959 Code. Before the 1959 Code was altered or supplanted in any way here relevant, all of the plaintiffs had satisfied all of the conditions necessary to entitle them to a pension under the 1959 Code.

Once the plaintiffs had satisfied the conditions of eligibility which governed the right to a pension under the 1959 Code, that Code became the plaintiffs' contract of retirement. Once the plaintiffs attained eligibility for a pension under the 1959 Code, they gained a vested right to have their retirement allowances computed according to the formula mandated by that Code.

For the legislature to freeze the FAS upon which benefits would be computed or to reduce the multipliers applicable to the FAS, as the legislature did by force of the 1972 Report of the Compensation Commission and the 1974 Code, was an obvious diminishment of the benefits the plaintiffs would have received under their contract of retirement, the 1959 Code. Such legislative provision violated Article I, Section 17, of the Pennsylvania Constitution by impairing the obligation of contracts.

Because of the conclusion we have reached there is no need to consider the plaintiffs' argument based on Article V, Section 16, of the Pennsylvania Constitution, which proscribes the diminishment of judicial compensation. Nor need we consider the plaintiffs argument based on the Contract Clause of the United States Constitution. In that latter regard, however, it is useful to compare the recent case in the Federal District Court of Delaware, *Marvel v. Dannemann*, 490 F. Supp. 170 (D.C. Del. 1980), in which the federal court invalidated a state legislative increase in the rate of pension contribution as it related to certain judges.

ORDER

AND NOW, the 23rd day of October, 1980, the plaintiffs' first motion for summary judgment is granted. We hereby determine and declare that the named plaintiffs and the certified class plaintiffs are constitutionally entitled to have their retirement allowances computed and paid according to the appropriate formula under the State Employees' Retirement Code of 1959, Act of June 1, 1959, P.L. 392, §§101 *et seq.*, 71 P.S. §§1725-101 *et seq.*

It is further ordered that the State Employees' Retirement Board shall recalculate the allowances of the named plaintiffs and any member of the certified

plaintiff class according to the said Retirement Code of 1959, and pay to such plaintiffs the difference between what they have received as allowances under other provisions and what they should have received as allowances under the Retirement Code of 1959.

It is also ordered that the plaintiffs' prayer for the award of counsel fees be made the subject of an application filed with this Court and addressing the standards set forth in Pa. R.C.P. No. 1716.

The plaintiffs' second motion for summary judgment is denied as being moot.

Judge WILKINSON, JR. dissents.

McKENNA v. STATE EMP. RETIREMENT BD.
[495 Pa. 324, 1981.]

433 A.2d 871

J. Frank McKENNA, Jr., an individual, on behalf of himself and all others similarly situated, and Frederic G. Weir, an individual, on behalf of himself and all others similarly situated

v.

The STATE EMPLOYEES' RETIREMENT BOARD and Richard L. Witmer, in his capacity as Executive Secretary of the State Employees' Retirement Board and Robert E. Casey, in his capacity as Treasurer of the Commonwealth of Pennsylvania, Appellants.

Supreme Court of Pennsylvania.

Argued Jan. 19, 1981.

Decided July 16, 1981.

Reargument Denied Sept. 10, 1981.

Class action was brought on behalf of all state court judges who were active and had ten or more years of service as of June 22, 1972 and who alleged that their benefits under State Employees' Retirement Code of 1959 had been unconstitutionally impaired by actions of Commonwealth Compensation Commission taken on June 22, 1972 and by provisions of revised State Employees' Retirement Code enacted in 1974. The Commonwealth Court, No. 2626 C.D. 1978, Robert W. Williams, Jr., J., granted class members leave, and State Employees Retirement Board, its executive secretary, and Commonwealth Treasurer appealed. The Supreme Court, No. 80–1–195, Roberts, J., held that Commonwealth Court correctly concluded that challenged actions impermissibly impaired class members' right to have their retirement benefits computed in accordance with formula mandated by Code of 1959.

Affirmed.

Nix and Flaherty, JJ., filed concurring opinions.

Larsen, J., filed a concurring opinion in which Flaherty and Kauffman, JJ., joined.

Judges ⇐22(11)

Where class members were state court judges who were active and had ten or more years of service as of June 22, 1972 and Retirement Code of 1959 established comprehensive mandatory retirement system for class members, freeze of final average salaries effected in June of 1972 by Commonwealth Compensation Commission and reduction of multiplier's effect in 1974 by enactment of statute, which altered class members' benefits package by failing to give recognition to actual salary increases, impermissibly impaired class members' right to have their retirement benefits computed in accordance with formula mandated by Code of 1959. (Per Roberts, J., with the Chief Justice concurring and four Justices concurring in result in three separate opinions.) 75 P.S. §§ 1725-101 et seq., 1725-102(6)(a)(ii), 1725-201(1), 1725-301, 1725-304, 1725-401(1)(e), (1.1), 1725-402(2)(c, d), 1725-801 (Repealed); 71 Pa.C.S.A. § 5101 et seq.; Const. Art. 1, § 17; Art. 5, § 16(b).

Harvey Bartle, III, Atty. Gen., Thomas J. Mangan, Jr., Asst. Atty. Gen., Harrisburg, for appellants.

John J. Bingler, Jr., Pittsburgh, for McKenna and Weir.

Judd N. Poffinberger, Pittsburgh, for Pa. Bar Assoc.

Before O'BRIEN, C. J., ROBERTS, NIX, LARSEN, FLAHERTY and KAUFMAN, JJ.

OPINION

ROBERTS, Justice.

This is a class action brought by appellees, Judge J. Frank McKenna and Judge Frederic G. Weir, on behalf of all state court judges who were active and had ten or more years of service as of June 22, 1972. The class members contend that their benefits under the State Employees' Retirement Code of 1959 have been unconstitutionally impaired by actions of the Commonwealth Compensation Commission taken on June 22, 1972, and by provisions of the revised State Employees' Retirement Code, enacted in 1974. The Commonwealth

Court agreed with class members' contention and directed appellant, the State Employees' Retirement Board, to recalculate class members' benefits. 54 Pa.Cmwlth. 338, 352, 421 A.2d 1236, 1243 (1980). This record compels the conclusion that the Commonwealth Court correctly granted class members relief. Hence, we affirm.

I.

The Retirement Code of 1959 establishes a comprehensive retirement system for state employees, including class members.[1] Class members' participation in the system is mandatory, taking effect upon commencement of judicial service. § 201(1). Under this mandatory system, class members and the Commonwealth are required to contribute to a Retirement Fund. §§ 301 & 304. Assets of the Fund are reserved for the payment of contributors' benefits. § 801. These benefits include the "superannuation retirement allowances" and "withdrawal allowances" which class members contend have been impermissibly impaired.[2]

Before 1972, when the Compensation Commission took its now-challenged action, a class member's benefits under the Code of 1959 were determined by two factors: years of service on the bench and "final average salary." Final average salary is defined as the highest annual compensation received by a contributor during any five nonoverlapping periods of twelve consecutive months. § 102(19). Benefits were calculated by multiplying the member's first ten years on the bench by the member's final average salary and then by a multiplier of 0.04. Added to this figure was the

1. Class members are specifically included within the Code's definition of "state employe." See Act of June 1, 1959, P.L. 392, § 102(6)(a)(ii), formerly 71 P.S. § 1725-102(6)(a)(ii) (1962).

A complete version of the Code of 1959, containing relevant amendments, does not appear in Purdon's Pennsylvania Statutes Annotated. Appellees have prepared a helpful Appendix to their Brief which contains the entire Code, as amended, as of June 22, 1972.

2. §§ 401(1)(e) & (e.1) (retirement allowance); §§ 402(2)(c) & (d) (withdrawal allowance).

product of the member's additional years on the bench, final average salary, and a multiplier of 0.03.[3]

Salaries of most class members had been increased in 1966 to $30,000.[4] Final average salaries as of June 22, 1972, thus were $30,000.

The retirement benefits of a hypothetical class member with fifteen years of service and a final average salary of $30,000 would be calculated under the Code of 1959 as follows:

Illustration No. 1	Multiplier		Final Average Salary		Years		Benefits
First 10 years	(0.04)	×	($30,000)	×	(10)	=	$12,000
Years beyond 10	(0.03)	×	($30,000)	×	(5)	=	$ 4,500
					TOTAL		$16,500.[5]

Because class members had served ten or more years as of June 22, 1972, under the Code of 1959 they had the right to separate from service and still leave contributions credited to their account. Upon reaching the "superannuation retirement age" of sixty, § 102(14), class members who chose to exercise this right would have been eligible to receive their retirement allowances. This right is termed "vesting."[6] Additionally, because of their ten or more years of service, class members were eligible as of June 22, 1972, for withdrawal benefits if service terminated involuntarily. See §§ 402(2)(c) & (d).

The Commonwealth Compensation Commission was a group of five private citizens who were directed by the

3. See id.

4. Before June of 1972, salaries were set by the Act of June 1, 1956, P.L. (1955) 1959, § 4, as amended, Act of January 26, 1966, P.L. (1965) 1602, § 2.

5. We borrow this illustration, as well as subsequent illustrations, from the Opinion of the Commonwealth Court.

6. See Act of July 31, 1968, P.L. 695, adding § 102(23.1).

Legislature to make an "exhaustive study" of the salaries and retirement benefits of public officers, including

> "the Governor, the Lieutenant Governor, the cabinet officers (including the Auditor General and the State Treasurer), the justices and judges of the Supreme Court, the Superior Court, the Commonwealth Court, the courts of common pleas, the Municipal Court of Philadelphia and the Traffic Court of Philadelphia, and the offices and members of the General Assembly."

Act of June 16, 1971, P.L. 157, § 2(b), 65 P.S. Appendix at p. 59 (Supp.1980). The first Report of the Commission was to take effect immediately, and was to have the effect of law,

> "unless, within sixty days following the date of submission thereof the General Assembly shall, by concurrent resolution reject the report, in whole or in part, or enacts legislation. . . ."

Id.[7]

On June 22, 1972, the Compensation Commission presented its first Report. The report set forth salary increases for members of the Executive, Judicial, and Legislative Branches. For class members, the report increased salaries to $40,000 from the level of $30,000 established in 1966. See supra note 4. However, the report provided that "[e]xisting salaries as established by law prior to the date of this Report . . . shall be used in computing . . . 'final average salary.' . . ." 1972 P.L. 1988, 65 P.S. Appendix at p. 62.

By Concurrent Resolution No. 1 of 1972, dated August 15, 1972, the Legislature limited salary increases set forth in the report to $2,500. 65 P.S. Appendix at p. 71. The Legislature left undisturbed the final average salary freeze contained in the report.

A subsequent report of the Compensation Commission, presented November 30, 1972, reinstated the salary increases set forth in the first report. This subsequent report also

7. No challenge is made to the permissibility of the Legislature's delegation of lawmaking authority to this legislatively created commission or to the concurrent resolution requirement.

sought to justify the position of the Compensation Commission regarding the final average salary freeze:

> "The Commission, when it established the freeze, was in receipt of an informal but well qualified legal interpretation that this action was permissible under existing legal and judicial guidelines. The reasoning was that the freeze did not constitute a reduction in the amount of pension accrual being earned by the respective members."

65 P.S. Appendix at p. 88.

Unlike the first report, this subsequent report was not acted upon by the Legislature. Thus, as of November, 1972, salaries of class members were set at $40,000. However, final average salaries were frozen at $30,000. Benefits were kept at a pre-1972 figure even though actual salaries had been increased.[8]

Without the freeze, a class member's final average salary would have been free to increase. For the hypothetical class member with fifteen years of service and a final average salary of $40,000, the benefits would have been calculated as follows:

Illustration No. 2	Multiplier		Final Average Salary		Years		Benefits
First 10 years	(0.04)	×	($40,000)	×	(10)	=	$16,000
Years beyond 10	(0.03)	×	($40,000)	×	(5)	=	$ 6,000
					TOTAL		$22,000.

Thus, had final average salaries not been frozen, actual salary increases would have been given effect, and retirement allowances would have been $22,000 instead of $16,500.[9]

8. In 1976, the Legislature repealed the November 1972 Compensation Commission report insofar as it related to judges' salaries and established a new salary schedule. Under the new schedule, those judges who had been assigned a salary of $40,000 were assigned a new salary of $45,000.

9. Our use of $40,000 as the final average salary of the hypothetical class member is for convenience. From June of 1972 to July of 1976,

In 1974, the Legislature established a new retirement system, the State Employees' Retirement Code (Code of 1974), 71 Pa.C.S. § 5101 et seq. This Code of 1974 abandoned the Compensation Commission's final average salary freeze. However, in its stead, the Code of 1974 established a system of reduced multipliers for use in the benefits formula. The multiplier of 0.04 for the first ten years of service contained in the Code of 1959 was reduced to 0.03. The multiplier of 0.03 for years beyond the tenth was reduced to .0025.[10] The Code also provided an "alternate method," under which class members were given the "option" of having benefits calculated on the basis of frozen final average salaries and multipliers in effect before the Code of 1974.[11]

The reduced multipliers contained in the Code of 1974 had the following effect on the benefits of the class member with fifteen years of service and a final average salary of $40,000:

Illustration No. 3	Multiplier		Final Average Salary		Years		Benefits
First 10 years	(0.03)	×	($40,000)	×	(10)	=	$12,000
Years beyond 10	(.0025)	×	($40,000)	×	(5)	=	$ 4,500
						TOTAL	$16,500.

Thus under the Code of 1974, like the final average salary freeze of the Compensation Commission, actual salary increases were not given effect. Benefits were the same before and after June 22, 1972, when actual salaries had first been increased.

II.

Appellees, Judges McKenna and Weir, were more than sixty years of age as of June 22, 1972, the effective date of

actual salaries were set at various amounts, including $32,500, $40,000, and $45,000.

10. Stipulation, Record at 22a-23a.

11. Id.

the final average salary freeze. Both reached the compulsory retirement age of seventy in the Spring of 1978. See Pa.Const. art. V, § 16(b). In November of 1978, the named judges commenced the present action by filing a two-count complaint, one for mandatory and the other for declaratory relief. Following class certification, the parties entered into a stipulation of facts. Appellees then moved for summary judgment.

In an opinion discussing several of the retirement benefits decisions of this Court, the Commonwealth Court en banc (Williams, J.) concluded that the actions of both the Compensation Commission and the Legislature violated art. I, § 17 of the Pennsylvania Constitution by "impairing the obligation of contracts." The Commonwealth Court proceeded on the premise that "[a]n employee who has complied with all conditions necessary to receive a retirement allowance cannot be affected adversely by subsequent legislation which changes the terms of the retirement contract." 54 Pa.Cmwlth. at 350, 421 A.2d at 1242. According to the Commonwealth Court, class members, who had ten or more years of service as of June 22, 1972, "had satisfied all of the conditions necessary to entitle them to a pension under the 1959 Code." 54 Pa.Cmwlth. at 351, 421 A.2d at 1243. Thus, the Commonwealth Court held:

> "Once the plaintiffs had satisfied the conditions of eligibility which governed the right to a pension under the 1959 Code, that Code became the plaintiffs' contract of retirement. Once the plaintiffs attained eligibility for a pension under the 1959 Code, they gained a vested right to have their retirement allowances computed according to the formula mandated by that Code."

54 Pa.Cmwlth. at 351, 421 A.2d at 1243. Judge Wilkinson dissented.

III.

Appellant Retirement Board makes two arguments in support of the final average salary freeze of the Compensation Commission and the reduction of multipliers contained

in the Code of 1974. First, assuming that there was a reduction of benefits, the Board asserts that such a reduction was an enhancement of the actuarial soundness of the Retirement Fund. According to the Board, the reduction was permissible because "none of [the class members]," apparently including those class members who have reached "superannuation retirement age" of sixty, "have complied with all conditions necessary to receive retirement." Second, in the alternative, the Board accepts the Commonwealth Court's view that class members have fulfilled all conditions of eligibility. Mirroring the position taken by the Commonwealth Compensation Commission, the Board asserts that even though salary increases were not given effect in calculating benefits, there is no impairment of the obligation of contracts where, as here, retirement benefits remain constant before and after the challenged actions. (See supra Illustrations No. 1 and No. 3).

We are not persuaded by the Board's contention that no class member has complied with conditions and that reductions thus are permissible. The record is clear, as the Commonwealth Court concluded, that all class members have established their eligibility for retirement benefits. All members have in common ten or more years of judicial service as of June 22, 1972. For those class members such as appellees Judge McKenna and Judge Weir, who were then sixty years of age or older and had served ten or more years, Section 401 of the Code of 1959 assures a retirement allowance upon retirement at or after the "superannuation age" of sixty. See §§ 401(1)(e) & (e.1). Those remaining class members with ten or more years of service who had not yet reached the age of sixty also are assured a retirement allowance upon reaching the age of sixty. Section 102(23.1), added by the Act of July 31, 1968, P.L. 695, provides:

> "'Vesting' . . . shall mean the right of a member who separates from service after having completed ten (10) or more years of credited service to leave accumulated deductions . . . credited to his account in the fund and upon reaching superannuation retirement age receive a superannuation retirement allowance."

See also § 401(5). Similarly assured is a withdrawal allowance for those class members who separate from service involuntarily. See §§ 402(2)(c) & (d). Thus, whether or not a class member is over sixty years of age, all have served ten or more years and are assured their benefits.[12]

We must also reject the Board's argument that, consistent with the obligation of contracts clause of the Pennsylvania Constitution, benefits here were permissibly kept at levels in effect before the final average salary freeze and reduction of multipliers. The Commonwealth Court correctly concluded that before the 1972 final average salary freeze and 1974 multiplier reduction, class members were entitled to a calculation of benefits based on the highest salaries they received during their years of service and the multipliers specified in the Code of 1959. When salary payments were periodically increased in accordance with the legislative judgment, benefits of class members under the retirement system established by the Code of 1959 also were to increase accordingly. The freeze of final average salaries effected in June of 1972 and the reduction of multipliers effected in 1974 disturbed class members' package of benefits by failing to give recognition to actual salary increases. The previously established eligibility of class members precludes this alteration of the benefits package.

Here the Commonwealth Court correctly concluded that the challenged actions impaired class members' previously

12. On this record there is no need to express any view on the Board's assertion that the reductions here are actuarially sound.

There is language in *Pennsylvania Association of Hospital Physicians, Inc. v. State Employees Retirement Board*, 25 Pa.Cmwlth. 632, 361 A.2d 449 (1976), suggesting that contributors under the Code of 1959 with ten or more years of service are nonetheless subject to changes in the system which are actuarially sound. That case did not involve class members. The Commonwealth Court deemed it inappropriate to make its earlier language in that case applicable here. We see no reason to disturb the Commonwealth Court's view of its own earlier case.

Amicus, Pennsylvania Conference of State Trial Judges, urges that a contract theory should be applied in this case so that those judges with less then ten years of service, not now before this Court, could also prevail. However, the record now before us makes it unnecessary to address the argument presented by the amicus.

established right to have their retirement benefits computed in accordance with the formula mandated by the Code of 1959. Its order must be affirmed.

Order affirmed.

NIX and FLAHERTY, JJ., filed concurring opinions.

LARSEN, J., filed a concurring opinion in which FLAHERTY and KAUFFMAN, JJ., join.

NIX, Justice, concurring.

Although I concur in the result reached by the majority opinion, that opinion fails to address the real issue created by our case law.

It is well established that retirement benefits are founded upon a contract theory of deferred compensation. *Harvey v. Allegheny County Retirement Board*, 392 Pa. 421, 141 A.2d 197 (1958); *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165, 97 A.2d 231 (1953); *McBride v. Allegheny County Retirement Board*, 330 Pa. 402, 199 A. 130 (1938); *Retirement Board of Allegheny County v. McGovern*, 316 Pa. 161, 174 A. 400 (1934).

However, some cases suggest that notwithstanding recognition of contractual rights from the time of entering employment and contributing to the retirement fund, the legislature may, prior to attaining eligibility to receive such benefits, enact legislation which changes the terms of the retirement contract if the change enhances the actuarial soundness of the retirement fund. *Geary v. Allegheny County Retirement Board*, 426 Pa. 254, 257–58, 231 A.2d 743, 745 (1967); *Harvey v. Allegheny County Retirement Board*, 392 Pa. at 431–32, 141 A.2d at 203.

The basic unfairness of acknowledging the contractual nature of retirement benefits as of the time of entering employment on the one hand, but allowing subsequent adjustments of these contract rights under the guise of protecting "actuarial soundness" on the other is obvious.

The terms and conditions of a retirement contract must necessarily exist at the time the contract is entered into. To

allow the state to unilaterally change, to the employee's detriment, the terms and conditions of the retirement contract based on the state's misjudgment of funding needs, is contrary to the bargained for terms existing at the time of the employee assumed his or her position.

The state has full control of the retirement program at the time it is entered into with the employee. To allow a unilateral change in the terms or conditions of the retirement contract subsequent to its creation, under any circumstances, is contrary to the prohibition against the state's impairment of the obligation of contracts.[1] "The Commonwealth can no more impair its contractual obligation by legislation unilaterally altering the terms of the pension it agreed to give to those in its service than it can by legislation abrogating its duty to pay in full the accrued salary of its employees." *Wright v. Allegheny County Retirement Board*, 390 Pa. 75, 79, 134 A.2d 231, 233 (1957).

The majority, in predicating its decision today upon the fact that class members' rights were vested, implicitly acknowledges the legitimacy of the "actuarial soundness" exception. With that position I cannot agree. I would therefore hold that a state employee has a fixed contract right to continued membership in a retirement fund, under the same rules and regulations prevailing at the time of employment, which may not be unilaterally qualified or altered by subsequent legislative enactment. *Wright, supra; Baker, supra.*

LARSEN, Justice, concurring.

I concur with Mr. Justice Roberts' result; I cannot however, accept his reasoning.

Article 5, § 16(a) of the Pennsylvania Constitution provides:

> Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.

1. U.S.Const., Art. I, § 10; Pa.Const., Art. I, § 17.

Compensation includes pension benefits as provided by the pension formula in effect on the date a judge first assumes his office. No decrease of *any* judicial compensation can occur "unless by law applying generally to all salaried officers of the Commonwealth." As there was no corresponding decrease to all salaried officers of the Commonwealth involved in the June 22, 1972 actions of the Commonwealth Compensation Commission and the 1974 revisions to the State Employees' Retirement Code, any judge who assumed office before March 1, 1974 (effective date of 1974 Retirement Code) will be unaffected by these two actions and their retirement benefits will be computed in accordance with the formula mandated by the State Employees' Retirement Code of 1959 and any subsequent increased enhancements.

FLAHERTY and KAUFFMAN, JJ., join in this concurring opinion.

FLAHERTY, Justice, concurring.

I join the Concurring Opinion authored by Mr. Justice Larsen and concur in the result reached by Mr. Justice Roberts but feel it necessary to write separately inasmuch as the reasons advanced for the conclusion reached fail to recognize that upon entry into the fund, the terms by which the retirement benefits accrue are contractually fixed. When the Commonwealth seeks unilaterally to modify that contract, it does so in violation of Article I, Section 17 of the Constitution of the Commonwealth of Pennsylvania which prohibits the passing of any law impairing the obligation of contracts.

That retirement benefits are contractually grounded was soundly recognized by this Court in *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165, 97 A.2d 231 (1953) where it was stated that "[a]s of the time [the employe] joined the fund, his right to continued membership therein, *under the same rules and regulations existing at the time of his employment*, was complete and vested. The legislature could not thereafter constitutionally alter the provisions of

his already existing contract of membership. His rights in the fund could only be changed by mutual consent." *Id.*, 374 Pa. at 169, 97 A.2d at 233.

Retirement benefits are not a gratuity; they are deferred compensation and should be viewed as such. To change the terms by which retirement benefits are a calculated strike at the heart of the compensation package.

The terms in effect on the date of hire are for all times the terms to which both parties are bound absent a modification by both parties. Regardless of length of service, the Commonwealth cannot unilaterally diminish the benefits or terms of the contract which the parties executed. Undue emphasis is placed by the majority opinion upon the fact that as of the change in 1972, the appellees had both attained ten years of service and that benefit had "vested" and were both over age sixty. Having served the Commonwealth for ten years, however, is not a *condition* to contractual obligation; that is already accomplished by making contributions. A threshold requirement of ten years service is a *condition* to be fulfilled before the employe has the option of separating from service while leaving the contribution intact and active. It is not determinative of whether he has a valid contract with the state or of what the terms of that contract are. This is determined by the retirement code in effect on the date service begins.

J. Frank McKenna, Jr., an individual, on behalf of himself and all others similarly situated et al., Plaintiffs *v.* Commonwealth of Pennsylvania, State Employees' Retirement Board et al., Defendants.

Retirement—Enforcement order—Exceeding scope of court order.

1. Plaintiffs prevailing in a mandamus action involving the calculation of retirement benefits are entitled to an enforcement order when the State Employees' Retirement Board exceeds the scope of the court's order and improperly applies such order to justify a recalculation of contribution and average salary amounts. [272]

Argued December 15, 1981, before President Judge CRUMLISH and Judges MENCER, ROGERS, WILLIAMS, JR., CRAIG and MACPHAIL.

Original jurisdiction, No. 2626 C.D. 1978, in case of J. Frank McKenna, Jr., an individual on behalf of himself and all others similarly situated, and Frederic

G. Weir, an individual, on behalf of himself and all others similarly situated v. The State Employees' Retirement Board and Ralph L. Witmer, in his capacity as Executive Secretary of the State Employees' Retirement Board and Robert E. Casey, in his capacity as Treasurer of the Commonwealth of Pennsylvania. Petition to the Commonwealth Court of Pennsylvania for enforcement of order of the Commonwealth Court of Pennsylvania. Held: Enforcement order issued.

John H. Bingler, Jr., with him *J. Frank McKenna, III*, and *Jerome J. Pottmeyer, III, Thorp, Reed & Armstrong*, for plaintiffs.

Mary Ellen Krober, Deputy Attorney General, with her *Thomas J. Mangan, Jr.*, Assistant Attorney General, *Allen C. Warshaw*, Deputy Attorney General, and *LeRoy S. Zimmerman*, Attorney General, for defendants.

PER CURIAM MEMORANDUM AND ORDER, January 26, 1982:

Plaintiffs, proceeding under Pa. R.A.P. 2591(b) and 42 Pa. C. S. §562, have petitioned for enforcement of the order of this court issued in *McKenna v. State Employees' Retirement Board*, 54 Pa. Commonwealth Ct. 338, 421 A.2d 1236 (1980), *affirmed*, Pa. , 433 A.2d 871 (1981). Our order of October 23, 1980 held that "plaintiffs' first motion for summary judgment is granted;" the pertinent part of that motion reiterated verbatim the relief requested in the complaint and thereby requested that this court:

> Issue a Writ of Mandamus ordering defendants to: (1) recalculate and pay the retirement allowances of the named and class plaintiffs in accordance with the 1959 Retirement Code and the constitutional provisions of the 1974

> Retirement Code, without reference to the 'freeze' imposed by the Compensation Commission Reports; and (2) pay to the named and class plaintiffs the difference between what they have received from defendants as retirement allowances and what they should have received.

Our order added a determination and declaration dealing only with the plaintiffs' retirement "allowances", thus clearly referring only to retirement benefits, with no reference to contributions whatsoever, because the issues of the case, as framed by both parties, related only to the reduction of benefits; the statement of questions by plaintiffs referred only to "retirement contract allowances," and "retirement benefits," and the counter-statement of questions by the defendant Board also referred only to "reducing the multiplier for purpose of computing retirement benefits" and "a reduction in the multiplier used to compute retirement benefits." Accordingly, in the very terms used by the Board in its description of the issues, the decision of this court was necessarily limited to the matter of the 1974 Code's reduction of "the multiplier used to compute retirement benefits."

After affirmance by the Pennsylvania Supreme Court, the Board concluded that the order provides the justification, as to the class plaintiffs, for the board to:

> 1. Retain the 1959 Code's higher class-of-service multiplier as to the rates of *contributions* to be made after January 1, 1973, so as to require billing members for additional contributions;
>
> 2. Demand, in relation thereto, reimbursement of so-called Option 4 withdrawals of *contributions;* and

3. Apply other provisions of the 1959 Code instead of the 1974 Code which were not at issue: e.g., the 1959 Code's final average salary computation based on a five-year period instead of the 1974 Code's final average salary computation based on a three-year period.

As noted above, the issues in the case, and hence the order, simply did not deal with contributions nor were the final averages salary provisions involved. The Board is not justified in reading into the order of this court a scope exceeding that described in the Board's own statement of the issues.

Consistent with the terms of the summary judgment motion which was granted, an enforcement order will issue.

PER CURIAM ORDER

Now, January 26, 1982, pursuant to plaintiffs' application, under Pa. R.A.P. 2591(b), to enforce this court's order dated October 23, 1980, defendants are hereby ordered and directed to:

1. Recalculate and pay the retirement allowances of the named and class plaintiffs in accordance with all provisions of law presently in effect and applicable, except that, in place of the class-of-service multiplier stated therein for purposes of computing retirement benefits, the provisions of Section 401(1) of the State Employees' Retirement Code of 1959, Act of June 1, 1959, P.L. 392, 71 P.S. §1725-401(1) shall govern; and

2. Pay to the named and class plaintiffs the difference between what they have received from defendants as retirement allowances and what they should receive under paragraph 1 above.

This decision was reached prior to the expiration of the term of office of Judge PALLADINO.

450 A.2d 1342

Francis J. CATANIA, Charles W. Sweet, Paul R. Beckert, Edward J. Bradley, John N. Sawyer, Edmund V. Ludwig, Joseph F. O'Kicki and Livingstone M. Johnson, as individuals, on behalf of themselves and all others similarly situated

v.

COMMONWEALTH of Pennsylvania, STATE EMPLOYEES' RETIREMENT BOARD and Robert L. Cusma, in his capacity as Secretary of the State Employees' Retirement System and Robert E. Casey, in his capacity as Treasurer of the Commonwealth of Pennsylvania.

Supreme Court of Pennsylvania.

Argued Jan. 21, 1982.

Decided June 25, 1982.

Reargument and Reconsideration Denied Sept. 24, 1982.

Judges of courts of common pleas of various counties filed two-count complaint in mandamus and for declaratory judgment, seeking ruling that modifications of State Employees Retirement Code did not apply to them and others similarly situated. Before Commonwealth Court ruled on their motion for summary judgment, the Supreme Court,

6. In view of our conclusion that the lower court erred in failing to grant the continuance requested by appellant, we need not address appellant's other contentions.

No. 81–3–480, accepted plenary jurisdiction and held that modifications did not apply to judges who had completed ten years of judicial service after effective date of freeze on "final average salaries" component of equation for determining retirement benefits but before effective date of statute abolishing freeze, and, by equally divided court, further held that modifications applied to those judges who would complete ten years of service after effective date of statute abolishing freeze, notwithstanding that retirement benefits contracted for by those judges at time of employment would thereby be reduced.

Summary judgment granted in part and denied in part.

O'Brien, C. J., filed opinion in support of denial of summary judgment to remaining plaintiffs in which Roberts and Hutchinson, JJ., joined.

Nix and Flaherty, JJ., filed opinions in support of grant of summary judgment to remaining plaintiffs in which Larsen, J., joined.

Larsen, J., filed opinion in support of grant of summary judgment to remaining plaintiffs.

1. Judges ⇐22(11)

Modifications of State Employees Retirement Code of 1959, which froze "final average salaries" component of equation for determining retirement benefits, retroactively abolished freeze and redefined "final average salaries," thereby reducing retirement benefits, did not apply to judges of county common pleas courts who had completed ten years of judicial service after effective date of freeze and before effective date of statute abolishing it. 71 P.S. §§ 1725–101 et seq., 1725–102(19, 23.1), 1725–301(1)(e), 1725–401(1)(e) (Repealed); 71 Pa.C.S.A. § 5101 et seq.; Const.Art. 1, § 17; U.S.C.A.Const.Art. 1, § 10, cl. 1.

2. Judges ⇐22(11)

By an equally divided court, the Supreme Court held that modifications of State Employees Retirement Code of 1959, which froze "final average salaries" component of

equation for determining retirement benefits, retroactively abolished freeze and redefined "final average salaries," applied to judges of county common pleas court who would complete ten years of service after effective date of statute abolishing freeze, notwithstanding that retirement benefits contracted for by those judges at time of employment would thereby be reduced. 71 P.S. §§ 1725–101 et seq., 1725–102(19, 23.1), 1725–301(1)(e), 1725–401(1)(e) (Repealed); 71 Pa.C.S.A. § 5101 et seq.; Const.Art. 1, § 17; U.S.C.A.Const. Art. 1, § 10, cl. 1.

Henry T. Reath, Alexis J. Anderson, Philadelphia, for appellants.

Mary Ellen Krober, Asst. Atty. Gen., for appellees.

Before O'BRIEN, C. J., and ROBERTS, NIX, LARSEN, FLAHERTY and HUTCHINSON, JJ.

ORDER

PER CURIAM:

[1, 2] Summary judgment granted in favor of plaintiffs Beckert, Catania, and Sweet. The Court being equally divided, summary judgment in favor of the remaining plaintiffs is denied.*

O'BRIEN, C. J., files an opinion in support of the denial of summary judgment to the remaining plaintiffs, in which ROBERTS and HUTCHINSON, JJ., join.

NIX, J., files an opinion in support of the grant of summary judgment to the remaining plaintiffs, in which LARSEN, J., joins.

* NIX, LARSEN and FLAHERTY, JJ., would add the following to the Court's order:

Mr. Justices Nix, Larsen and Flaherty take issue with the use of the word "denied" and are of the view that the word "undecided" is accurate. The inability of this Court to reach a definitive answer on the request for summary judgment on behalf of the remaining plaintiffs does not preclude the Commonwealth Court from considering the question and reaching its own decision.

LARSEN, J., files an opinion in support of the grant of summary judgment to the remaining plaintiffs.

FLAHERTY, J., files an opinion in support of the grant of summary judgment to the remaining plaintiffs, in which LARSEN, J., joins.

McDERMOTT, J., did not participate in the consideration or decision of this case.

OPINION

O'BRIEN, Chief Justice.

Plaintiffs, Francis J. Catania, Charles W. Sweet, Paul R. Beckert, Edward J. Bradley, John N. Sawyer, Edmund V. Ludwig, Joseph F. O'Kicki and Livingstone M. Johnson are judges of the courts of common pleas of various counties. In January, 1981, the plaintiffs filed a two-count complaint, one in mandamus and the other for declaratory judgment in the Commonwealth Court, naming as defendants the State Employees' Retirement Board, Robert L. Cusma, Secretary of the State Employees' Retirement System and Robert E. Casey, Treasurer of the Commonwealth. In essence, the plaintiffs sought a ruling that modifications of the State Employees Retirement Code of 1959,[1] adopted in both 1972 and 1974, did not apply to plaintiffs and others similarly situated. Following completion of the pleadings, plaintiffs filed a motion for summary judgment. Before the Commonwealth Court ruled on the motion, this Court, at the plaintiffs' request, accepted plenary jurisdiction and must now determine whether summary judgment should be granted.

A brief review of the pension laws is necessary. Under the Retirement Code of 1959, a judge's retirement benefits consisted of:

> "... four one-hundredths (4/100) of his final average salary for each year of service during his first ten (10) years as judge, and thereafter equal to three one-hundredths (3/100)

1. Act of June 1, 1959, P.L. 392, No. 78, § 101, et seq.

thereof for each such year of service . . . not [to] exceed eighty (80) percent of his final average salary."

§ 401(1)(e). "Final Average Salary" was defined as:

". . . The highest average annual compensation received by a contributor as a state employe during any five (5) nonoverlapping periods of twelve (12) consecutive months of contributory service. . ."

§ 102(19). Judges were eligible to begin collecting retirement benefits after ten years of judicial service, § 102(23.1) and upon reaching sixty years of age § 102(14). Simply put, a judge's annual retirement benefits could be calculated by the following formula:

Benefits = Final Average Salary × 10 years × .04

+

Final Average Salary × years in excess of ten × .03[2]

In 1972, the Commonwealth Compensation Commission raised the annual salaries of the judges of the courts of common pleas from $30,000 to $40,000. The Commission, however, decided that for the purpose of determining retirement benefits, the "final average salary" component of the equation would be frozen at $30,000 as of June 22, 1972.

The legislature then passed the State Employees' Retirement Code of 1974.[3] For purposes relevant to our inquiry, the Retirement Code of 1974 made the following changes.

2. A regular, or Class "A" employee's benefits = Final Average Salary × number of years × .02. Thus, a judge, working ten years with a salary equal to that of a Class "A" employee, would receive an annual pension twice that of the Class "A" employee. Judges, however, were required to contribute twice the amount required from a Class "A" employee for the first ten years and one and one-half times that amount for each year thereafter. § 301(1)(e). As a general rule, Class "A" employees contributed 5% of their annual compensation into the fund so that generally, a judge would contribute 10% of his compensation for each of the first ten years and 7.5% for each year thereafter. Thus, a direct correlation existed between the benefits a retiree would receive and the contributions that a retiree made into the fund.

3. Act of March 1, 1974, P.L. 125, No. 31, § 1 et seq., 71 Pa.C.S. § 5101, et seq. (Supp. 1981 82).

The 1972 freeze on "final average salaries" was abolished retroactively to January 1, 1973 and is now defined as:

> "The highest average compensation received as a member during any *three* nonoverlapping periods of four consecutive calendar quarters during which the member was a state employee..."

71 Pa.C.S. § 5102 (Emphasis Added). While benefits and contributions for Class "A" employees generally remained the same, a judge's contributions were reduced 25% from 10% to 7.5% of annual compensation for the first ten years and from 7.5% to 5.625% for each year thereafter.[4] Retirement benefits were also reduced 25% in a similar proportional fashion, so that the multipliers which were .04 and .03 under the Retirement Code of 1959 were now reduced to .03 and .0225 respectively. Retirement benefits may not exceed the highest compensation during any period of twelve consecutive months. 71 Pa.C.S. § 5702(c). Employees are also given a number of options in deciding how retirement benefits will be paid. 71 Pa.C.S. § 5705(a).

Individual plaintiffs fall into one of three separate classes. Plaintiffs Catania, Sweet and Beckert completed ten years of judicial service after June 22, 1972, but before March 1, 1974, the effective date of the Retirement Code of 1974. Plaintiffs Bradley, Sawyer, O'Kicki and Ludwig commenced judicial service before June 22, 1972, and completed ten years of service after March 1, 1974. Plaintiff Johnson commenced judicial service between June 22, 1972, and March 1, 1974, and will complete ten years of service after the latter date.

Plaintiffs now argue that the 1972 and 1974 changes cannot apply to them because members of a public retirement system, at the time of taking office and joining the

4. The "basic contribution rate" is set at 5% of annual compensation. "Regular member contributions" are defined as "the product of the basic contribution rate, the class of service multiplier if greater than one and the compensation of the member." Finally a judge's class of service multiplier is set at 1.5 for the first ten years and 1.125 for each subsequent year. 71 Pa.C.S. § 5102. These class of service multipliers are 25% less than the corresponding multipliers of the Code of 1959.

system, acquire a contractual right to receive pension benefits undiminished during their term of office. They further argue that the provision of the Pennsylvania Constitution which proscribes a decrease in judicial salaries unless the compensation of all salaried officers is decreased, similarly prohibits application of the changes to them. Plaintiffs thus argue that their motion for summary judgment must be granted.

Pa.R.C.P. 1035(b) provides:

> "The judgment sought shall be rendered if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

Further, summary judgment is to be granted only in the clearest of cases where the right in question is clear and free from doubt. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (1979). I am convinced, however, that a review of the applicable case law and relevant constitutional provisions compels the conclusion that while plaintiffs Catania, Sweet and Beckert are entitled to summary judgment the remaining plaintiffs have failed to establish their clear entitlement to the relief requested.

It is well-settled that in Pennsylvania public retirement benefits are viewed as deferred compensation and not as gratuities. *Wright v. Retirement Board of Allegheny Co.*, 390 Pa. 75, 134 A.2d 231 (1957); *Retirement Bd. of Allegheny Co. v. McGovern*, 316 Pa. 161, 174 A. 400 (1934). Such a distinction is critical, for in those jurisdictions which view such benefits as gratuities, the benefits are alterable at the will of the grantor. Once the benefits are deemed to be a form of compensation, an employee obtains certain contractual rights. Both the Constitution of the United States and the Constitution of Pennsylvania contain provisions prohibiting the legislative impairment of contracts. U.S. Const. Art. I, § 10, Pa.Const. Art. I, § 17. Nonetheless, I am unconvinced that a pension plan is absolutely unalterable once a public employee has commenced employment and joined the retirement plan.

In *Retirement Board of Allegheny Co. v. McGovern, supra,* this Court stated:

> "Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an *inchoate right,* but when the conditions are satisfied, at that time retirement pay becomes a *vested right* of which the person entitled thereto cannot be deprived: it has ripened into a full contractual obligation."

Id., 316 Pa. at 169, 174 A. at 404–05. (Emphasis Added).[5] Implicitly, at least, inchoate rights were not held to come under the protection of Art. I, § 17 of the Pennsylvania Constitution.

In *McBride v. Retirement Board of Allegheny Co.,* 330 Pa. 402, 199 A. 130 (1938), appellant began collecting a pension from Allegheny County, having worked for twenty years and reached age 50 as required by the retirement law then in existence. Immediately thereafter, McBride commenced employment with the Commonwealth. Subsequently, the retirement law was amended to allow the suspension of retirement benefits should the retiree accept employment with another governmental unit. This Court held that the aforementioned amendment did not apply to McBride, explicitly stating:

> "We endeavored to specifically hold in the *McGovern* case that eligibility for retirement pay is complete as soon as an employee or member of a retirement system has satisfied the conditions requisite for retirement.... His rights to such pay are fixed as of the time he attained eligibility. Until retirement pay is earned as above described the right is inchoate. During this period retirement pay is being built up. The inchoate right becomes a *complete vested right* when the conditions connected with

5. Since retirement pay is a form of deferred compensation and an employee's contributions are deducted from his salary, the *McGovern* court was compelled to point out that an employee had an immediate vested right in his own contributions.

the particular retirement system are complied with. *This right* cannot be *thereafter* disturbed by legislation."

Id., 330 Pa. at 405–06, 199 A. at 132 (Emphasis Added).

In *Kane v. Policemen's Relief & Pension Fund*, 336 Pa. 540, 9 A.2d 739 (1939), appellant had retired from the Police Department of the City of Pittsburgh in 1927 and began collecting a pension from the Police Pension Fund Association of the City of Pittsburgh. Immediately thereafter, Kane accepted employment as the police chief of Mt. Lebanon Township. In 1935, the legislature created the Policemen's Relief & Pension Fund of the City of Pittsburgh. The legislature also provided that members of the old fund could, upon election, become members of the new fund. The new fund had a provision that any pensioner accepting other public employment should have his benefits suspended while so employed. When Kane elected to join the new fund, the managers of the new fund attempted to suspend his pension payments. This Court held that Kane could continue collecting his pension, stating:

"The pension right of a member of the old fund . . . was a *contract right*, a vested right *by reason of contract*. It may be that it was inchoate or incomplete until he had been an employee of the Bureau of Police for a period of twenty years and had been granted a pension, *but it was just as much a vested right before he was awarded a pension as it was afterwards.*"

Id., 336 Pa. at 545, 9 A.2d at 742 (Emphasis Added). It is the emphasized language of the above-quoted passage that forms the basis of the position espoused by plaintiffs.

The plaintiffs argue:

"A contract with its attendant rights and obligations is formed on the date of hire, not some indeterminate future date when certain events relating to eligibility to receive payments may or may not occur. When a judge takes office the pension rights are set; factors like years of service and age affect only the amount of the pension, rather than the right to it."

This Court has recognized the existence of the "contract theory" when dealing with pensions, but application of that theory does not require that all specifics of a pension plan be carved in stone as of the date an employee joins a plan.

Plaintiffs believe that *Baker v. Retirement Board of Allegheny Co.*, 374 Pa. 165, 97 A.2d 231 (1953) and *Hickey v. Pittsburgh Pension Board*, 378 Pa. 300, 106 A.2d 233 (1954) support their view that the contract theory absolutely forbids any changes in a pension law after an employee joins the retirement plan. In *Baker*, the employee retired from the City of Pittsburgh in 1929 and began collecting a pension. Almost immediately thereafter, he commenced employment with Allegheny County. In 1937, the county pension law was amended to prohibit any county employee from qualifying for a pension if that employee was receiving another governmental pension while in the county's employ. When Baker retired from the county, he was denied pension benefits because of the 1937 amendment. Despite the fact that Baker had neither worked the necessary number of years nor reached the required age to qualify for a pension from the county at the time of the 1937 amendment, the Court held that the changes wrought by the amendment did not apply to Baker.

> "As of the time he joined the fund, his right to continue membership therein, under the same rules and regulations existing at the times of employment, was complete and vested. The legislature could not thereafter constitutionally alter the provisions of his already existing contract of membership. *His rights in the fund could only be changed by mutual consent.*"

Baker v. Retirement Board of Allegheny County, supra at 374 Pa. 169, 97 A.2d, at 233. (Citations Omitted) (Emphasis Added).

Similarly, in *Hickey v. Pittsburgh Pension Board, supra*, the employee began working for the City of Pittsburgh in 1910. In 1915, the legislature passed a pension law entitling Hickey to collect a pension after working for the city for twenty years and reaching sixty years of age. In 1933, the

1915 law was amended to deny benefits to any pensioner who secured employment with another governmental unit. Hickey retired in the early 1950's after turning sixty and began collecting a pension which was discontinued when he began working for Allegheny County. This Court held that the 1933 amendment did not apply to Hickey.

Plaintiffs would have this Court believe that since Baker had not yet served twenty years when the 1937 amendment was passed, it necessarily follows that their absolutist view of the contract theory is the correct one. Similarly, they believe *Hickey* supports their position because Hickey was not yet sixty when the 1933 amendment was enacted. Plaintiffs' analysis, however, ignores one important factor.

In both *Baker* and *Hickey*, the amendments in question attempted to prohibit an employee from collecting a pension from one political subdivision while simultaneously being employed by another. In *Schmidt v. Retirement Board of Allegheny Co.*, 394 Pa. 105, 145 A.2d 692 (1958), the Court was reviewing a similar law and stated:

> "The Act of 1953 is *not the kind of retirement law which is reasonably related to enhancing or strengthening the actuarial soundness of the retirement fund.* Cf. *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165, 97 A.2d 281 (1953), and *Hickey v. Pittsburgh Pension Board*, 378 Pa. 300, 106 A.2d 233 (1954). The purpose of the Act of 1953 was to give effect to the public policy against governmental employees receiving more than one retirement allowance from governmental retirement systems."

Id., 394 Pa. at 108, 145 A.2d at 693–4. (Emphasis Added). Defendants argue that the 1974 Code may be applied to plaintiffs because the modifications therein enhance the actuarial soundness of the plan. Plaintiffs do not argue that the instant modifications do not enhance actuarial soundness; rather, plaintiffs believe the "contract theory" precludes the coexistence of that theory with the concept of enhancing actuarial soundness. Again, I do not take such an absolutist view of the "contract theory".

In *Harvey v. Retirement Board of Allegheny Co.*, 392 Pa. 421, 431–32, 141 A.2d 197, 203), this Court stated:

"We may thus summarize the law relating to the rights of a public employee in the retirement system as follows:

"1. An employee who has complied with all conditions necessary to receive a retirement allowance cannot be affected adversely by subsequent legislation which changes the terms of the retirement contract.

"2. An employee who has not attained eligibility to receive a retirement allowance may be subject to legislation which changes the terms of a retirement contract if the change is a reasonable enhancement of the actuarial soundness of the retirement fund.

"3. An employee who has not attained eligibility to receive a retirement allowance may not be subject to legislation which changes the terms of the retirement contract if the change does not reasonably enhance the actuarial soundness of the retirement fund."

Plaintiffs would have this Court disregard *Harvey*, generally arguing that it is not in the mainstream of case law in this Commonwealth relating to pension laws. I do not agree.

The concept of "actuarial soundness" appears in our case law at least as early as 1934 in *Retirement Board of Allegheny Co. v. McGovern, supra:*

"But underlying all retirement systems of the class we are now discussing, is the legislative object, as well as that of the member employee, that a substantial reserve be built up so that the actuarial soundness of the plan cannot be questioned. This factor is an important one in the relation between state, city and county, as employer, and the employee member, with respect to retirement pay. If a direct attack on it, such as has been made in the present case, is justified, or a weakness in it manifested through actual trial is found to exist, the remedy or relief rests clearly within the relation between employer and employee contemplated by the legislative system for retirement pay. The legislature may from time to time, within the confines of that established relation, alter, change, amend,

and render intact the actuarial soundness of the system so as to strengthen its fibers in any way it sees fit. Changes in details, such as length of service required, contributions needed, and age requirements, to keep the fund on sound actuarial practices, are essential. Flexibility in component parts is a paramount necessity to guard against changed conditions and to permit keeping abreast with actuarial science."

Id., 316 Pa. at 175–76, 174 A. at 407.

Further, in *McBride v. Retirement Board of Allegheny Co., supra* 330 Pa. at 408, 199 A. at 133, this Court stated:

"The Board may . . . while employee's right is inchoate, adopt such regulation for the betterment of the retirement fund's security. It may increase payments or require other actuarial changes to protect the established principal, but as to employees who have through time built up or acquired their right to retirement pay, on the assurance from the government that it will be fully met, the government must understand that a definite fixed obligation has been assumed."

See also, Hickey v. Pittsburgh Pension Board, supra (The Legislature "may strengthen the actuarial fibers.") As *McBride* makes clear, a contractual obligation that may not be broken is one where the employee's pension has vested, regardless of whether that employee either has retired and begun collecting benefits or has chosen to keep working.

There are very few cases where this Court ruled that modifications in a pension plan did in fact relate to the actuarial soundness of the program and thus permitted those changes to apply to employees who were already members of the pension plan. *Harvey* was one such case where the Court held that increasing the age requirement from fifty to sixty related to actuarial soundness and thus could be applied to employees whose pensions had not yet vested. In *Eisenberger v. Harrisburg Police Pension Fund*, 400 Pa. 418, 162 A.2d 347 (1960), the employee commenced working when the retirement plan provided for payment of retirement benefits after the employee had worked for twenty years

and attained age fifty-five. Subsequently, the law was amended, lowering the age requirement to fifty but increasing the years of service requirement to twenty-five. When Eisenberger passed his fiftieth birthday, he retired and attempted to collect pension benefits despite having worked for only twenty years. This Court affirmed the trial court's denial of benefits, stating:

> "The length of service required to qualify an individual for a pension is a material part of the retirement system, and is one of the material actuarial components necessary for the establishment and operation of a proper retirement system. While the City of Harrisburg cannot alter the terms of a pension contract without the consent of the employee if he has already satisfied the conditions for receiving a pension, the city by ordinance, as well as the legislature by enactment, prior to the employee's fulfillment of the conditions, may change or add to these conditions when such changes enhance the actuarial soundness of the fund."

Id., 400 Pa. at 422, 162 A.2d at 348.

I am not unmindful that allowing changes in the retirement laws to enhance actuarial soundness could render nugatory the language in *Kane v. Policemen's Relief & Pension Fund, supra* 336 Pa. at 545, 9 A.2d at 742, where we stated:

> "The pension right . . . was a contract right, a vested right by reason of contract. It may be that it was inchoate or incomplete until he had been an employee of the Bureau of Police for a Period of twenty years and had been granted a pension, *but it was just as much a vested right before he was awarded a pension as it was afterwards.*"

(Emphasis Added). On the other hand, accepting the plaintiffs' absolutist view of the contract theory would erase over fifty years of case law recognizing the right and duty of the legislature to maintain an actuarially sound retirement fund. I do not believe that resolution of this conflict presents an insurmountable obstacle; rather, the problem exists because

of the paucity of cases concerning allowable changes to maintain actuarial soundness.

As any amendments either lowering retirement benefits or tightening eligibility requirements would enhance the actuarial soundness of a fund, the legislature theoretically could set retirement benefits so low, and make eligibility requirements so strict for employees whose pension rights have not vested, as to effectively deny those employees their deferred compensation in the form of retirement benefits. With this in mind, this Court stated:

> "[P]ublic employees who have become eligible for retirement allowance *and those who are in the process of becoming eligible possess certain vested and contractual rights with which the legislature may not constitutionally interfere.*"

Geary v. Retirement Board of Allegheny Co., 426 Pa. 254, 257, 231 A.2d 743, 745 (1967) (Emphasis Added); *Kane v. Policemen's Pension & Relief Fund, supra.*

Other jurisdictions, while maintaining the concept of allowing changes to enhance actuarial soundness, have expressed it in different ways. The matter was best put, in our view, by the Supreme Court of California, which stated:

> "To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in the pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. . ."

Allen v. City of Long Beach, 45 Cal.2d 128, 131, 287 P.2d 765, 767 (1955). There, the applicable pension law was altered in the following respects. Under the old law, a retiree's annual pension benefits were equal to one-half of the salary *currently* attached to the position that the retiree held one year prior to the employee's retirement. The amendment in question proposed abolishing the fluctuating benefits and setting annual benefits at one-half of the average salary the employee *actually received* during the five years preceding

retirement. The court found this change unreasonable because:

> "... Payment of a fixed amount freezes the benefit at a figure which is based on salary scales preceding retirement, thus the longer an employee is retired on a fixed pension the more likely it is that the amount of his pension will not accurately reflect existing economic conditions, whereas a retired employee receiving a fluctuating pension based on the salaries that active employees are currently receiving can maintain a fairly constant standard of living despite changes in our economy."

Id., at 132, 287 P.2d at 767. Further, the challenged amendment attempted to increase employee contributions from 2% of income to 10% of income without a corresponding increase in benefits. As neither of these proposals contained any benefits which could have counterbalanced to obvious detriments suffered by the existing employees, the court found the proposed changes to be unreasonable and hence invalid. *Accord, Opinion of the Justices*, 364 Mass. 847, 303 N.E.2d 320 (1973).

Adopting this approach for use in this Commonwealth would allow the legislature to maintain an actuarially sound retirement fund while still protecting the contract rights of employees that have not completely vested in the sense that the employee is eligible to collect the pension. Furthermore, by allowing changes with corresponding advantages and disadvantages, the employee remains in relatively the same position both before and after the changes.[6]

When reviewing the 1974 Retirement Code in this light, it becomes clear that the changes can be applied to some of the plaintiffs without violating any constitutional provisions of either the United States Constitution or the Pennsylvania Constitution. Further, such an application does not disturb the contract theory which is recognized in our case law.

6. Adopting this standard would, of course, require a partial overruling of *Harvey v. Allegheny Co. Retirement Board, supra*, to the extent that it held that merely increasing the age requirement and applying that change to the existing, nonvested members was allowable to enhance actuarial soundness.

While it is true that plaintiffs' retirement benefits will be somewhat reduced, this reduction in benefits will be accompanied by a proportional reduction in contributions. In addition, final average salary is now defined as the highest average salary during a *three* year period as compared to a *five* year period under the 1959 Code. While the 1959 Code limited retirement benefits to 80% of final average salary, the 1974 Code allows benefits to equal the highest compensation during any twelve month period. Further, the 1974 Code provided optional benefit packages not available under the Code of 1959. Finally, the 1974 Code, when computing benefits, takes into account the higher, pre-1974 contribution rate and allows those higher contributions to increase benefits. 71 Pa.C.S. § 5702(a)(1). I thus believe that the advantages proffered by the 1974 Code are more than sufficient to offset the disadvantages in applying those changes to plaintiffs. This being so, there has been no impairment of any contract rights and plaintiffs' claim that applying these changes to them violates U.S.Const. Art. I, § 10, and Pa. Const. Art. I, § 17 must fail. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

Plaintiffs also argue that applying the 1974 Code to them violates Art. V, § 16(a) of the Pennsylvania Constitution, which provides:

> "Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth."

Because retirement benefits are deferred compensation, plaintiffs argue that reducing such benefits constitutes an impermissible reduction of compensation. I, however, do not believe that application of the 1974 Code to plaintiffs violates the aforementioned constitutional provision for the following reasons.

Although application of the 1974 Code will have the effect of reducing a judge's annual retirement benefits, this reduction is accompanied by other changes which are advanta-

geous to plaintiffs. I believe the analysis used for plaintiffs' impairment of contract claim is apt here. It must be remembered that total compensation has two components, i.e. present and deferred. While the deferred portion may be reduced, the decreased present contributions will give the judges an increase in presently spendable income. Further, Art. V, § 16(a) is intended to maintain the independence of the judiciary and protect that independence from encroachment from the other branches of the government. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). As the 1974 Code reduces pension benefits to both the legislature and the judiciary through a reduction in the class of service multiplier, I am unable to see how this can in any way encroach upon the independence of the judiciary. We thus find no violation of Art. V, § 16(a) of the Pennsylvania Constitution.

The 1972 freeze on "final average salary" presents one additional problem. While that component used in computing pension benefits was frozen in an attempt to enhance the actuarial soundness of the plan, the freeze, which obviously worked to the judges' detriment, was not accompanied by any offsetting benefits.[7] *Cf. Allen v. City of Long Beach, supra.* (A proposed change from fluctuating benefits based on present salaries to a fixed scale based on salaries at the time of retirement is unreasonable and thus invalid.) Therefore, the freeze could not have been applied to any members of the judiciary who were members of the retirement plan before the freeze went into effect. The only possible application of the freeze would relate to those

7. The judges' salaries were increased at the time "final average salary" was frozen. As previously stated, judicial compensation is divided into two parts: "present", which is the salary paid, and "deferred" which is represented by pension payments. When deciding if changes detrimental to the employee are offset by accompanying benefits, the benefits, if any, must be contained in the pension plan itself, thus precluding consideration of increases in salary as an offsetting benefit. *Cf. McKenna v. State Employees Retirement Board*, 495 Pa. 324, 433 A.2d 871, 876 (1981) ("When salary payments were periodically increased . . ., benefits . . . under the retirement system established by the Code of 1959 also were to increase accordingly.") (plurality opinion).

judges, represented by plaintiff Johnson, who joined the retirement plan when the freeze was in effect. Even there, however, I would hold the freeze is not applicable. In *Geary v. Retirement Board of Allegheny County*, 426 Pa. 254, 231 A.2d 743 (1967), we held that employees could take advantage of modifications enacted prior to vesting which are beneficial to the employee. Even using the reduced multipliers under the 1974 Code, those judges would receive higher retirement benefits where higher average salary was computed using the formula presented therein. *Cf. Baker v. Retirement Board of Allegheny County, supra* (even after pension rights have vested, modifications can become effective by *mutual* consent). I thus believe the 1972 freeze on "final average salary" is, in effect, a nullity.[8]

Plaintiffs Catania, Sweet and Beckert are in exactly the same situation as the judges in *McKenna v. State Employees Retirement Board*, 495 Pa. 324, 433 A.2d 871 (1981) insofar as their pensions have vested prior to the 1974 Code, thus making that law inapplicable to them. The right of plaintiffs Catania, Sweet, and Beckert to participate under the benefits package of the Code of 1959 is of course conditioned upon their willingness to pay into the retirement fund in accordance with the provisions of the Code of 1959. Throughout the history of our Commonwealth's retirement system, the benefits payable to a pensioner have been directly proportional to the contributions which the pensioner has made to the retirement system during active state service. Under the Code of 1959, a member of the judiciary is eligible for benefits on the basis of a "class of service multiplier" of 2.00 for the first ten years of service, and 1.50 for those years of service in excess of ten. The member is subject to the same multiplier of 2.00 and 1.50 for purposes of calculat-

8. The Act of March 1, 1974, P.L. 125, which established the Code of 1974, contains the following repeal of the final average salary freeze:
"In the case of any member terminating service on or after the effective date of this act any limitations on salaries as determined for retirement purposes pursuant to the Act of June 16, 1971 (P.L. 157, No. 8), are repealed retroactive to January 1, 1973."
Plaintiffs Catania, Sweet and Beckert completed ten years of judicial service after January 1, 1973.

ing contributions. When in 1974 the Legislature adopted its new retirement Code, and reduced the benefits multipliers by 25%, the contribution multipliers were reduced by an identical percentage. Under the Code of 1974 both the benefits multiplier and the contributions multiplier were reduced to 1.50 for the first ten years of service and to 1.125 for years of service in excess of ten. Thus it is obvious that plaintiffs would reap a substantial windfall directly affecting the integrity of the fund if they could elect to receive benefits under the Code of 1959 while contributing only at the rates prescribed under the Code of 1974.

The deleterious effect upon the retirement fund of such a windfall is illustrated by the following example of a judge who has worked 20 years at a salary of $40,000.[9] Under the Code of 1959, the class member would contribute to the system at a rate of 10% of gross earnings for each of the first ten years of service (2.00 multiplier × 1959 rate of contribution of 5%), and 7.5% of gross earnings for each of the remaining 10 years (1.5 multiplier × 1959 rate of 5%). Total contributions would be $70,000, calculated as follows:

10% x $40,000 x 10 -	$40,000	(first ten years)
7.5% x $40,000 x 10 -	30,000	(remaining ten years)
	$70,000	

The annual benefits available under the Code of 1959 would be 4% of final average salary for each of the first ten years (2.0 × 1959 rate of 2%), and 3% for the remaining 10 (1.5 × 1959 rate of 2%), totalling $28,000:

4% x $40,000 x 10 -	$16,000	(first ten years)
3% x $40,000 x 10 -	12,000	(remaining ten years)
	$28,000	

Annual benefits under the Code of 1959 for a judge retiring with twenty years of service would thus be 40% of total contributions, computed as follows:

$$\frac{\$28,000}{70,000} \text{ - - - } 40\%$$

9. Although actual salary and the years of service for individual judges may vary, the figures chosen for the following examples are kept constant for the sake of simplicity.

Under the Code of 1974, the contributions would be 7.5% of gross earnings for the first ten years of service (1.5 multiplier × 1974 rate of 5%), and 5.625% for years of service in excess of ten (1.125 multiplier × 1974 rate of 5%). The total contribution, $52,500, is determined as follows:

7.5% x $40,000 x 10 -	$30,000	(first ten years)
5.625% x 40,000 x 10 -	22,500	(remaining ten years)
	$52,500	

The annual benefits available would be determined on the basis of 3% of final average salary for each of the first ten years worked, (1.5 × 2%), and 2.25% for each of the remaining ten (1.125 × 2%), or a total annual benefit of $21,000:

3% x $40,000 x 10 -	$12,000	(first ten years)
2.25% x 40,000 x 10 -	9,000	(remaining ten years)
	$21,000	

The annual benefits under the Code of 1959 for a judge retiring with twenty years of service under the Code of 1974 would again be 40% of total contributions:

$21,000 / 52,500 - - - 40%

Plaintiffs Catania, Sweet and Beckert, however, argue that they are entitled to the higher benefits under the 1959 Code even though they have contributed at the lower rates mandated by the 1974 Code. To continue with our previous examples, assume that a judge completed ten years of service immediately before the effective date of the 1974 Retirement Code. Thus, these employees' contributions would be:

10% x $40,000 x 10 -	$40,000	(first ten years at 1959 contributions)
5.625% x 40,000 x 10 -	22,500	(second ten years at 1974 contributions)
	$62,500	Total contributions

As the employees ask that benefits be calculated entirely at the higher 1959 rates, those annual benefits, for a judge completing twenty years of service, would be $28,000. Annual benefits as a percentage of total contributions would now be:

$\frac{\$28,000}{\$62,500}$ - - - 44.7%

Instead of receiving annual benefits at the proportional rate of 40% of his total contributions, the judge would disproportionately receive annual benefits equal to 44.7% of his total contributions.[10] Because such disproportionate benefits would unjustly enrich plaintiffs at the expense of others who have properly contributed and received only proportionate benefits, a party entitled to, and who wishes to receive benefits pursuant to the Code of 1959, must also make the contributions required by that Code.

As plaintiffs Catania, Sweet and Beckert had served ten years before the effective date of the 1974 Retirement Code, their motion for summary judgment, insofar as consistent with this opinion, is granted.

The grant of summary judgment to the remaining plaintiffs, whose pensions were not vested by March 1, 1974, would require the concurrence of at least four justices. There not being at least four justices to grant summary judgment, summary judgment must be, and is, denied.

ROBERTS and HUTCHINSON, JJ., join in this opinion.

OPINION IN SUPPORT OF THE GRANT OF SUMMARY JUDGMENT

NIX, Justice.

Although I concur in the result reached by Chief Justice O'Brien as to plaintiffs, Catania, Sweet and Becker, I disagree with the denial of the remaining plaintiffs' motion for summary judgment.

In *McKenna v. State Emp. Ret. Bd.*, 495 Pa. 324, 433 A.2d 871 (1981) the plurality opinion authored by Mr. Justice Roberts did not address the central question of whether the contractual right to retirement benefits may be unilaterally changed by the state as to terms or conditions on the basis of protecting "actuarial soundness."

10. Indeed the greater the number of years of contributions pursuant to the Code of 1974, the more disproportionate the benefits would be.

It was my position in *McKenna, supra*, that unilateral changes by the state in the terms and/or conditions of the retirement contract subsequent to the employment, where those changes inure to the detriment of the employee, violates the constitutional prohibition against the state's impairment of the obligation of contracts.[1] It is significant that in all of the decisions suggesting existence of a legislative reservation of authority to make unilateral changes for actuarial soundness, they were not situations where the retirement benefits contracted for by the public employee at the time of employment were thereby reduced or diminished.[2]

1. This Court has sustained unilateral changes in instances where the benefits to be received by the employee were not disturbed. *Retirement Board v. McGovern*, 316 Pa. 161, 174 A. 400 (1934) (length of service required, contributions needed and age requirements); *McBride v. Retirement Board of Allegheny County*, 330 Pa. 402, 199 A. 130 (1938) (improved administrative methods or technical changes in detail).

   In *Hickey v. Pitts. Pension Bd.*, 378 Pa. 300, 106 A.2d 233 (1954), this Court clearly indicated the legislature's right to insure actuarial soundness is limited by the prohibition against impairment of contracts, when we said:

   "The Legislature may strengthen the actuarial fibers but it cannot break the bonds of contractual obligations. The permissible changes, amendments and alterations provided for by the Legislature can apply only to conditions in the future, and never to the past. According to the cardinal principle of justice and fair dealings between government and man, as well as between man and man, the parties shall know prior to entering into a business relationship the conditions which shall govern that relationship. Ex post facto legislation is abhorred in criminal law because it stigmatizes with criminality an act entirely innocent when committed. The impairment of contractual obligations by the Legislature is equally abhorrent because such impairment changes the blueprint of a bridge construction when the spans are half way across the stream.

   378 Pa. 309–310, 106 A.2d at 237–238.

2. Here the reduction of retirement benefits does not avoid being an impairment because the increased available expendable income does not offset the diminuition of the deferred payment. The amendment unilaterally requires prospective retirees to contribute less towards their retirement benefits so as to facilitate a substantial reduction in the sovereign's obligatory contribution to those benefits.

Those who would deny summary judgment would have us depart from this Court's established restrictions on the "actuarial soundness" principle by partially overruling *Harvey v. Allegheny Co. Retirement Board*, 392 Pa. 421, 141 A.2d 197 (1958) and permit a reduction in retirement benefits by adopting a fluctuating benefits approach counter-balanced by corresponding advantages and disadvantages. That such an approach might violate the U.S. Constitution, Art. I, § 10, and Pa.Const., Art. I, § 17, does not appear to present a problem for those who would deny summary judgment. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (on which they rely) is not the constitutional safe-haven for state unilateral change of contracts as they suggest. Rather, it resuscitates the Contract Clause of the United States Constitution and articulates "... an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, *complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake.*" (Emphasis supplied.) 431 U.S. at 25–26, 97 S.Ct. at 1519.

The Supreme Court also rejected the "total destruction test" for determining impairment (implicitly applied by those who would deny summary judgment here) stating: "The extent of impairment is certainly a relevant factor in determining its reasonableness. But we cannot sustain the [impairment] simply because the bondholders' rights were not totally destroyed." 431 U.S. at 27, 97 S.Ct. at 1520.

The state legislature knew there was a need for actuarial soundness long before these plaintiffs accepted the terms and conditions of their employment contract. And the reduction of benefits is not the only method by which the actuarial fibers of the retirement fund could be strengthened. Thus the reduction of benefits is neither reasonable nor necessary.

Accepting the principle that the state's duty to maintain the fiscal integrity of the retirement fund through actuarial soundness is a valid basis for *some changes in a retirement*

system, nevertheless, the state's unilateral reduction of retirement benefits arising from the employment contracts cannot pass constitutional muster and must fall.[3]

LARSEN, J., joins in this opinion.

OPINION IN SUPPORT OF THE GRANTING OF SUMMARY JUDGMENT

LARSEN, Justice.

I join in Mr. Justice Nix's and Mr. Justice Flaherty's Opinions in Support of the Granting of Summary Judgment. Additionally, I reaffirm my position as set forth in my concurring opinion in *McKenna v. State Employees' Retirement Board*, 495 Pa. 324, 433 A.2d 871 (1981).

OPINION IN SUPPORT OF THE GRANTING OF SUMMARY JUDGMENT

FLAHERTY, Justice.

This case concerns whether the Pennsylvania legislature has the power unilaterally to change the retirement contracts of judges prior to vesting of such contracts. I agree with Mr. Chief Justice O'Brien that summary judgment should be granted to plaintiffs whose pension rights were vested before the effective date of the 1974 Retirement Code.

I disagree, however, that there may be unilateral changes made in judicial retirement contracts *during the term* of office of a judge, whether for "actuarial reasons" or for any reasons not specified in the Pennsylvania Constitution. Pa. Const. art. V, § 16(a) provides:

3. For similar views, *see Wagoner v. Gainer*, W.Va., 279 S.E.2d 636 (1981); *Miles v. The Tennessee Consolidated Retirement System, et al.*, Tenn., 548 S.W.2d 299 (1976); *Sylvestri v. Minnesota*, 298 Minn. 142, 214 N.W.2d 658 (1973); *Campbell v. Michigan Judges Ret. Bd.*, 378 Mich. 169, 143 N.W.2d 755 (1966); *Bardens v. Board of Trustees of Judges Retirement System of Illinois*, 22 Ill.2d 56, 174 N.E.2d 168 (1961).

> Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation *shall not be diminished during their terms of office*, unless by law applying generally to all salaried officers of the Commonwealth.

The "term of office" to be served by judges is established by Pa.Const. art. V, § 15(a), which provides: "The regular term of office of justices and judges shall be ten years...."

The plain effect of these two provisions is that although legislation may be *enacted* reducing the compensation, i.e., retirement benefits of judges, the reduction of benefits will not be applicable to any judge serving a term at the time of the enactment, although it may be applied to him if his retirement rights are not vested after his existing term ends, when, after re-election, a new term commences.* Judges who are elected will not be subject to changes in retirement benefits, because they will have vested interests in the retirement fund by the end of their term of office (since the term of office is ten years and the interest in the fund vests in ten years), but an appointed judge who stands for election at the end of his appointed term may not have a vested retirement interest, and therefore, at the beginning of a new elected term, may be subject to retirement contract changes.

I disagree further with the opinion of Mr. Chief Justice O'Brien that what is tantamount to the "employment contract" of judges may be altered so as to reduce compensation of any judge so long as the purpose of the reduction is to make the retirement fund "actuarily sound". Article I,

* If the Constitution were interpreted as prohibiting any reduction in the compensation of judges at *any* time, such a construction would, in effect, render meaningless the language in Pa.Const. art. V, § 16(a), *supra* which limits the diminishment of compensation of judges "during their terms of office." In interpreting the Constitution, effect must be given, whenever possible, to all of its provisions. *Cavanaugh v. Davis*, 497 Pa. 350, 440 A.2d 1380 (1982). Had the drafters of the Constitution intended that compensation for judges could at no time be reduced, they would not have included the qualifying phrase "during their terms of office."

Section 17 of the Pennsylvania Constitution forbids the Commonwealth's acting so as to impair contracts. It does not provide that employment contracts may be impaired if the purpose is to make retirement funds "actuarily sound", as it were. An elected judge has an "employment contract" for ten years, and such a contract may not be unilaterally changed during the term of the contract. Such an alteration, if unilateral, would violate both Pa.Const. art. V, § 16(a) (the compensation of judges shall not be diminished during their terms of office) and art. I, § 17 (the Commonwealth shall not impair contracts).

In sum, I would hold that reductions in retirement benefits may not be made during a judge's term of office, but such reductions may be made when a term of office ends and a new term begins, if the judge's interest in the retirement fund has not vested.

I would, therefore, grant summary judgment as to all plaintiffs.

LARSEN, J., joins.

MEMORANDUM

McDERMOTT, Justice.

Before coming to this Court, I joined those now seeking review in these proceedings. Therefore, I have recused myself. It is my opinion that Mr. Justice Hutchinson should do likewise. Prescinding from the question of ultimate integrity and addressing only the issue of appearance, Mr. Justice Hutchinson has in this particular case an extra weight on that scale. Not only is he a member of the class directly affected, but while a member of the General Assembly, he voted for the statute in question. I do not believe necessity requires that the litigants in this case should be obliged to appeal to one whose vote created the legislation they contest.

Francis J. Catania et al., Plaintiffs *v.* Commonwealth of Pennsylvania, State Employees' Retirement Board et al., Defendants.

Judges—Retirement benefits—Vesting—Impairment of contracts —State Employees' Retirement Code of 1974, 71 Pa. C. S. §§5101-5956—Judicial compensation clause—Constitution of Pennsylvania, Article V, Section 16.

1. When the rights of a member of the Commonwealth retirement system have been treated as vested by reason of the member reaching the minimum years of tenure, any change in the retirement system which would reduce benefits then applicable are barred. [402]

2. A change in a pension system for public employes to enhance the actuarial soundness of the fund will not be permitted where unreasonable. [403-4]

3. Contractual rights of a Commonwealth employe in the state retirement system accrue upon employment, the first day of membership in the system. [404]

[Appendix S]

394 CATANIA et al. *v.* ST. EMP. RET. BD. et al.

Syllabus—Statement of the Case. [71 Commonwealth Ct.

4. Changes in the Commonwealth retirement system effected by the State Employees' Retirement Code of 1974, 71 Pa. C. S. §§5101-5960, which result in a net detriment to the employe constitute a constitutionally impermissible impairment of the contract into which the employe entered by becoming a member of the fund upon employment. [409]

5. Changes in the Commonwealth retirement system which effect a diminution in benefits to which members of the judiciary are entitled and which have no such effect upon employes of the executive branch of government are impermissible being violative of the judicial compensation clause of Article V, Section 16 of the Constitution of Pennsylvania. [409-10]

Argued December 14, 1982, before Judges BLATT, CRAIG and MACPHAIL, sitting as a panel of three. President Judge CRUMLISH, JR. and Judges ROGERS, WILLIAMS, JR. and DOYLE did not participate.

Original jurisdiction No. 101 C.D. 1981, in case of Francis J. Catania, Charles W. Sweet, Paul R. Becker, Edward J. Bradley, John N. Sawyer, Edmund V. Ludwig, Joseph F. O'Kicki and Livingstone M. Johnson, as individuals, on behalf of themselves and all others similarly situated v. Commonwealth of Pennsylvania, State Employees' Retirement Board and Robert L. Cusma, in his capacity as Secretary of the State Employees' Retirement System, and Robert E. Casey, in his capacity as Treasurer of the Commonwealth of Pennsylvania. Complaint in mandamus and for declaratory judgment in the Commonwealth Court of Pennsylvania seeking recalculation of retirement benefits. Plenary jurisdiction accepted by Supreme Court of Pennsylvania. Summary judgment granted three plaintiffs. Case returned to Commonwealth Court of Pennsylvania. Held: Motion for summary judgment of plaintiffs granted.

Henry T. Reath, with him *Alexis J. Anderson* and *Robert E. Kelly, Jr.*, *Duane, Morris & Heckscher*, for plaintiffs.

Mary Ellen Krober, Deputy Attorney General, with her *Allen C. Warshaw*, Deputy Attorney General, Chief of Special Litigation, and *LeRoy S. Zimmerman*, Attorney General, for defendants.

Sidney L. Krawitz, with him *Joseph F. Kameen*, *Krawitz & Ridley, P.C.*, for Amicus Curiae, Pennsylvania Bar Association.

OPINION BY JUDGE CRAIG, January 27, 1983:

The Record

The matter now before this court* began with a complaint, with counts in mandamus and for declaratory judgment, which eight judges of courts of common pleas of various counties filed originally in this court against the State Employees' Retirement Board, its secretary and the Treasurer of the Commonwealth. After the pleadings closed, with no dispute of fact involved, the plaintiffs presented a motion for summary judgment, asking that we order the recalculation of the retirement pension benefits of the plaintiffs, and others similarly situated, under the State Employes' Retirement Code of 1959[1] without reference to certain modifications effective June 22, 1972 and March 1, 1974, as discussed below.

The Pennsylvania Supreme Court then accepted plenary jurisdiction of the case. After argument, the Supreme Court granted the requested summary judgment in favor of those three of the plaintiffs[2] who had

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* Duly scheduled before the court en banc; heard and decided by Judges BLATT, CRAIG and MACPHAIL following a decision by the other members of the court not to participate.

[1] Act of June 1, 1959, P.L. 392, *as amended, formerly* 71 P.S. §§1725-101—1725-809, repealed by the Act of March 1, 1974, P.L. 125, §2(a).

[2] Francis J. Catania, Charles W. Sweet, and Paul R. Beckert.

completed ten years of judicial service before March 1, 1974, but after June 22, 1972. *Catania v. State Employees' Retirement Board*, ___ Pa. ___, 450 A.2d 1342 (1982). Being divided with respect to the issues raised by the remaining plaintiffs, the Supreme Court has returned the case for our consideration as to those five plaintiffs, four of whom[3] began their judicial service before June 22, 1972 and completed ten years of service after March 1, 1974, while the remaining plaintiff[4] commenced his judicial service between the two stated dates and accordingly will also complete ten years of service after the 1974 date.

The provisions of the 1959 Code for the calculation of judges' pension benefits and contributions, and mathematical illustrations of the effects of the 1972 and 1974 modifications, have appeared in *McKenna v. State Employees' Retirement Board*, 495 Pa. 324, 433 A.2d 871 (1981) (all of the justices concurring in the result) consistently with the presentation of the same in the opinion of the Chief Justice in this case. In short, the 1959 benefits formula, before those modifications, was

Benefits =

Final Average Salary x 10 years x .04

Plus

Final Average Salary x years beyond 10 x .03

As to judges' contributions to the pension fund, the 1959 Code generally required 10% of salary to be contributed during the first ten years and 7.5% in each year thereafter.

The Commonwealth Compensation Commission, in its report of June 22, 1972, while recommending salary increases for members of the executive, judicial and

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[3] Edward J. Bradley, John W. Sawyer, Edmund V. Ludwig, and Joseph F. O'Kicki.

[4] Livingstone M. Johnson.

legislative branches, froze the "Final Average Salary" compensation for pension purposes at $30,000, a figure below the actual salary level recommended.

Although the legislature, by Concurrent Resolution No. 1, of August 15, 1972, permitted the final average salary freeze to remain, thereafter the new State Employees' Retirement Code of 1974, 71 Pa. C. S. §§5101-5956, eliminated the final average salary freeze but established a reduction of 25% in the multipliers for the benefits formula. The multiplier of .04 for the first ten years of service was reduced to .03, and the multiplier of .03 for years beyond ten was reduced to .025. The same 1974 Code also reduced the required contributions by 25%, from 10% to 7.5% of salary for the first ten years, and from 7.5% to 5.625% for years beyond ten.

As illustrated by calculations submitted by affidavit on behalf of the defendant board in this case, as applied to the typical case of the Honorable Edmund V. Ludwig, one of the four-judge group noted above, the effect of the 1974 change is as follows:

Annual full retirement annuity (age 60)

1959 Code $30,318.81
1974 Code $22,739.10

Adjusted for early retirement, the respective figures become (1959) $22,739.11 and (1974) $17,054.33.

Calculations from an affidavit submitted on behalf of the plaintiffs proceed from that point to apply a Cost of Life Annuity factor to arrive at a Present Value of Account of $478,632 under the 1959 Code alone and $358,974 under the 1959 Code as modified by the 1974 Code, for a total difference of $119,658. The same affidavit calculates the difference in contribution totals ($72,500 and $58,125, respectively) to be $14, 375, thus presenting a net dollar detriment of $105,283.

We consider other impacts of the 1974 Code, both quantifiable and unquantifiable, below. The 1974 Code also repealed the 1972 freeze, retroactively to January 1, 1973.

In focusing upon the precise questions which remain in this case, it is apparent that the Supreme Court, despite dividing in other respects in *Catania*, unanimously agreed that the 1972 freeze cannot lawfully be applied to any who were members of the retirement plan before the freeze's effective date (four of the five judges now involved here), nor even to the one plaintiff who joined the retirement plan after that date because, even in the view of those justices who would refuse summary judgment in favor of those judges in other respects, the freeze clearly was wholly detrimental. The fact or prospect of salary increases was of no moment, according to the opinion of former Chief Justice O'Brien, because "[w]hen deciding if changes detrimental to the employee are offset by accompanying benefits, the benefits, if any, must be contained in the pension plan itself, thus precluding consideration of increases in salary as an offsetting benefit." *Catania*, Pa. at , 450 A.2d at 1351, n. 7.

Of course, we cannot disagree with the indicated unanimous view of the Supreme Court, that any effect of the 1972 freeze must be excluded from the pension calculations of the plaintiffs. Therefore, the issues of the 1974 Code changes become our sole concern.

The Questions

A broad statement of the issue now before us is as follows:

With respect to judges who, by assuming office, became members of the retirement plan before the date of a statutory amendment decreasing the dollar amount of benefits and the dollar amount of contribu-

tions, as well as making other changes, do the constitutional provisions prohibiting legislative impairment of contracts and prohibiting the diminution of judges' compensation during their terms of office, unless applied generally to all salaried officers of the Commonwealth, bar the application of those legislative changes to the calculation of pension benefits?

The pertinent line of judicial decisions is by now familiar. We now must inquire whether the distinction (expressed in some of the precedents) between pension rights acquired upon joining the pension fund, in comparison with those attained upon completion of the prescribed minimum years of service, is a distinction having any real difference in substance.

The Background of Judicial Decisions

As the lexicon to follow in our consideration, we necessarily must note that the term "vesting" has traditionally been used when the employee, having made all required contributions, has completed the minimum number of years of service required for eligibility. *Hickey v. Pittsburgh Pension Board*, 378 Pa. 300, 106 A.2d 233 (1954). That terminology is in accordance with the Code of 1959; section 102(23.1) of that Code, added by the Act of July 31, 1968, P.L. 695, provided that "vesting" shall mean "the right of a member who separates from service after having completed ten (10) or more years of credited service to leave accumulated deductions . . . credited to his account" entitling him to receive a retirement allowance "upon reaching superannuation retirement age."

We have reviewed all of the major decisions which have considered whether or not statutory changes in pension plan terms can be constitutionally applied to pension plan members, both before such vesting by years of service and after the required number of years have expired; a footnote lists the citations of

these cases in alphabetical order.[5] To present that survey in a compact form, we have tabulated those cases, listing the nature of the statutory changes in condensed form down the left-hand column and classifying the decisions, according to their facts, as to whether the pension contract rights of the respective plaintiffs had become, in the terminology noted above, "vested." We have noted the salient instances in which, beginning with *Harvey* and *Schmidt* in 1958, the Supreme Court stressed the actuarial soundness purpose as a basis for allowing statutory pension changes to have effect before "vesting."

The tabulation follows:

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[5] *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165, 97 A.2d 231 (1953);

Barello v. State Employes' Retirement System, 49 Pa. Commonwealth Ct. 364, 411 A.2d 852 (1980);

Cianfrani v. State Employes' Retirement Board, 57 Pa. Commonwealth Ct. 135, 417 A.2d 279 (1980), *on reh.* 57 Pa. Commonwealth Ct. 143, 426 A.2d 1260 (1981);

Eisenberger v. Harrisburg Police Pension Commission, 400 Pa. 418, 162 A.2d 347 (1960);

Geary v. Allegheny County Retirement Board, 428 Pa. 254, 231 A.2d 743 (1967);

Harvey v. Allegheny County Retirement Board, 392 Pa. 421, 141 A.2d 197 (1958);

Hickey v. Pittsburgh Pension Board, 378 Pa. 300, 106 A.2d 233 (1954);

Kane v. Policemen's Relief & Pension Fund of Pittsburgh, 336 Pa. 540, 9 A.2d 739 (1939);

Mauch v. Allegheny County Retirement Board, 381 Pa. 492, 113 A.2d 230 (1955);

McBride v. Allegheny County Retirement Board, 330 Pa. 402, 199 A. 130 (1938);

McKenna v. State Employees' Retirement Board, 495 Pa. 324, 433 A.2d 871 (1981);

Schmidt v. Allegheny County Retirement Board, 394 Pa. 105, 145 A.2d 682 (1958);

Wright v. Allegheny County Retirement Board, 390 Pa. 75, 134 A.2d 231 (1957).

TABULATION—PENSION DECISIONS

STATUTORY CHANGE—EFFECTIVENESS AT ISSUE	CHANGE *BEFORE* VESTING BY SERVICE YEARS—EFFECT ON PENSION CONTRACT	CHANGE *AFTER* VESTING BY SERVICE YEARS—EFFECT ON PENSION CONTRACT
1. Suspension of pension during further public employment		CHANGE BARRED: *McBride* 1938 *Kane* 1939 *Hickey* 1954
2. Prohibition against drawing multiple public pensions EFFECTIVE: *Schmidt* 1958—Change enacted before employment was resumed (Not "actuarial soundness")	CHANGE BARRED: *Baker* 1953	CHANGE BARRED: *Mauch* 1955
3. Time limit as to repayment of withdrawn contributions for new benefit		EFFECTIVE: *Wright* 1957
4. Increase of contributions rate and minimum age required	EFFECTIVE: *Harvey* 1958 Involved "actuarial soundness"	
5. Increase of service years required; establishment of minimum age	EFFECTIVE: *Eisenberger* 1960 Involved "actuarial soundness"	
6. Reduction of age requirement	EFFECTIVE: *Geary* 1967 Reduced "actuarial soundness"	
7. Forfeiture upon conviction		CHANGE BARRED: *Burello* 1980 *Cianfrani* 1981
8. Reduction of benefits and contribution rate		CHANGE BARRED: *McKenna* 1981

From that survey, we note in the right-hand column one series of results (as distinguished from decisional theories) concerning which no disagreement appears: Where a member's rights have been treated as "vested" by reason of attaining the minimum years of tenure, any and all changes which would reduce the benefits then applicable have been barred. Only the *Wright* decision permitted an amendment to have effect after "vesting," but that amendment involved a new deadline before which an employee who had withdrawn any contributions was required to repay them in order to qualify for a newly-granted increment of 5% of the annual retirement allowance for each service year beyond twenty. Because compliance with the deadline was a condition precedent to obtaining the new benefit, the Supreme Court majority did not regard that new provision as having the effect of a condition subsequent modifying benefits already in effect.

The difficulty, of course, remains with respect to pension fund members like the plaintiffs in this case, who had commenced employment but not attained minimum tenure before the enactment of the legislative change.

Certain Pennsylvania Supreme Court decisions concerning these issues, before 1958, articulated rather strongly the concept that contractual rights accrue upon employment, at the first day of membership in the system. In *Baker,* on which the plaintiffs here place considerable reliance, the Supreme Court held that a legislative prohibition against receiving more than one public pension could not constitutionally be applied to a member who had not yet reached the minimum tenure for vesting. The opinion of Mr. Justice MUSMANNO was unequivocal in stating:

> As of the time he joined the fund, his right to continued membership therein, under the same

> rules and regulations existing at the time of his employment, was complete and vested. The legislature could not thereafter constitutionally alter the provisions of his already existing contract of membership. His right in the fund could only be changed by mutual consent. . . .
>
> Once Baker had entered into the County Retirement system, and had made his first payment, his rights were just as much vested as they were at the termination of his employment.

Baker, 374 Pa. at 169, 171, 97 A.2d at 233-34.

Wright, noted above, followed the 1953 *Baker* case in 1957; although the "vested" status of the employee in *Wright* could cause statements about earlier status to be regarded as dictum, we note that the opinion of Mr. Justice COHEN, citing *Baker*, announced:

> We have said, and now reaffirm, that a public employe has a contract right to continued membership in a retirement fund, under the same rules and regulations prevailing at the time of his employment, which may not be qualified or altered by subsequent legislative enactment.

Wright, 390 Pa. at 79, 134 A.2d at 233.

Sensitive to possible inconsistency, the *Wright* opinion regarded certain language in *Hickey*, holding that rights become vested upon completion of twenty years of service, as less exact than the *Baker* language quoted earlier in the *Hickey* opinion; of course, *Hickey*, unlike *Baker*, involved in fact the situation of an employee who had passed the point of minimum tenure for pension eligibility.

Shortly thereafter came *Harvey*, which permitted a legislative increase of both contributions rate and minimum service tenure to be effective on the basis that such changes involved enhancement of the "ac-

tuarial soundness" of the pension fund. Using terms applicable to the employee in that case, who had not achieved minimum tenure, *Harvey* stated:

> An employe who has not attained eligibility to receive a retirement allowance may be subject to legislation which changes the terms of the retirement contract if the change is a reasonable enhancement of the actuarial soundness of the retirement fund.

Harvey, 392 Pa. at 431-2, 141 A.2d at 203. Importantly, the same passage in *Harvey* also stated the converse of that proposition—an employee who has not attained eligibility is nevertheless not subject to amendments which do not reasonably enhance the actuarial soundness of the fund. Thus *Harvey* established restrictions on the "actuarial soundness" basis for legislative change, by expressly and definitively recognizing that changes for actuarial soundness are nevertheless to be rejected if they are not reasonable. Also, for present purposes, we must note that *Harvey*, although it involved very real changes, did not involve a change like the change in this case, a reduction of benefits along with a reduction of contributions by an amount not necessarily equal in value.

Next we have *Eisenberger*, involving an amendment which increased the minimum years of tenure and established a minimum age, sought to be applied to a member who had entered public employment three months earlier. Holding that actuarial soundness was involved in that sort of change, Mr. Justice COHEN's opinion expressly follows "the rule established in Harvey . . . [as] the rule which we now apply," but without any express consideration of whether or not such enhancement was reasonable. *Eisenberger*, 400 Pa. at 422, 162 A.2d at 348-49.

Geary, in 1967, presented a change which had little parallel to the one we now confront. In that case, the minimum age requirement was reduced; thus the amendment was one which could be viewed as advantageous to an individual pension applicant but also could be recognized as reducing the actuarial soundness of the fund.

Where a judicial system can draw upon nearly a half century of experience with pension questions like those now before us, we are aided in reading the constitutional provisions prohibiting legislative impairment of contracts, U.S. Const., art. I, §10, Pa. Const. art. I, §17, or upon the judicial compensation clause in Pa. Const. art. V, §16(a). The essence of judicial consistency and continuity, and therefore the avoidance of the creation of policy by the judiciary, is in holding close to the experience of previous decisions and their principles, with recognition that the facts of the present case may differ.

The Impairment of Contracts Clause

The circumstances closest to the present case are those in *Baker* and *Harvey*, but those cases did not involve the kind of change presented here. Moreover, in *Baker*, the prohibition against drawing multiple public pensions could be regarded as a policy not intended for the actuarial enhancement of either pension fund.

Granting that any legislative demand has the effect of enlarging a pension fund contributes to its actuarial strength, as in the case of the contributions increase in *Harvey* or the benefits decrease here, we are drawn back to the rule of reason which continues to echo from *Harvey* in both of the respective opinions in *Catania* which deal with contract impairment. The opinion of Chief Justice O'Brien states that not only public employees who have become eligible for retirement al-

lowance but also *"those who are in the process of becoming eligible possess certain vested and contractual rights with which the legislature may not constitutionally interfere,"* (emphasis in original) citing *Geary* and *Kane*.[6] In a vein not greatly dissimilar, the opinion of Mr. Justice NIX states "that unilateral changes by the state in the terms and/or conditions of the retirement contract subsequent to the employment, *where those changes inure to the detriment of the employee,* violates the constitutional prohibition against the state's impairment of the obligation of contracts."[7] (Emphasis supplied.)

To say, as was said in *Harvey,* that steps for pension fund conservation will not be allowed, even before "vesting," if they bear unreasonably upon the pension fund member who is a party to the contract, is a proposition not substantially different from concluding that pre-vesting changes which subject the employee to a net detriment are constitutionally unacceptable.

To apply such a test is not easy. As noted above, any reduction of the benefit amounts for which a pension fund will hereafter be obligated necessarily enhances the actuarial strength of the fund; on the other hand, also inescapable is the point that an improvement in the financial soundness of the pension fund benefits all of its members in a broad but important sense, whether they are as yet remote from the point of collecting benefits or are among those currently receiving benefits and therefore concerned that such benefits continue.

Counsel have brought to our attention all of the other aspects of the 1974 Code to be considered, in addition to the dollar decrease of benefits and contribu-

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[6] *Catania,* Pa. at , 450 A.2d at 1349.

[7] *Id.* at , 450 A.2d at 1353.

tions described above. At retirement, the 1974 Code provides for the new Option 4, permitting employees to withdraw, in a lump sum, all the contributions made into the fund and the interest accrued on the contributions. 71 Pa. C. S. §5705(a)(4)(iii). It reduced from twenty to ten the minimum number of years in office before a judge could voluntarily retire, and expanded the circumstances under which all members could obtain credit for military service.

Final average salary is now defined as the highest average salary during a three-year period, as compared to a five-year period under the 1959 Code. While the 1959 Code limited retirement benefits to 80% of final average salary, the 1974 Code allows benefits to equal the highest compensation during any twelve-month period. Further, the 1974 Code provided optional benefit packages not available under the Code of 1959. Finally, the 1974 Code, when computing benefits, takes into account the higher, pre-1974 contribution rate and allows those higher contributions to increase benefits. 71 Pa. C. S. §5702(a)(1).

Finally, however, we have the benefit of an affidavit of the Assistant Secretary of the State Employees Retirement System, submitted on behalf of the defendant board. To the extent that the board, in that affidavit, has been able to quantify the effect of the complex of changes described above, that quantification has been well and succinctly set forth in Example 1A, Benefit Calculation of the Honorable Edmund V. Ludwig, whose situation both sides have selected as a typical case. We reproduce Example 1A below, but we note that, although both columns are labeled as being "Under The 1959 Code Multipliers," that is true only for the column on the left; the column on the right obviously states results "Under The *1974* Code Multipliers."

EXAMPLE 1A
BENEFIT CALCULATION OF THE HONORABLE EDMUND V. LUDWIG

Standard Benefit Calculation:

	Under The 1959 Code	*Multipliers*	*Under The 1959 Code*	*Multipliers*
$55,000 X 2% X 10.000 =	$11,000.00 X	2.0 =	$ 22,000.00	X 1.5 = $ 16,500.00
$55,000 X 2% X 5.0417 =	$ 5,545.87 X	1.5 =	$ 8,318.81	X 1.125 = $ 6,239.10
Annual Full Retirement Annuity (age 60):			$ 30,318.81	$ 22,789.10
Contributions and Interest as of 12/31/83			$101,197.32	$ 87,118.66
Calculations to Adjust for Early Retirement:				
Annual Full Retirement Annuity (age 60) (calculated above)			$ 30,318.81	$ 22,789.10
X Early Retirement Reduction Factor			X 75.0%	X 75.0%
Adjusted Annual Full Retirement Annuity: (adjusted for Early Retirement)			$ 22,739.11	$ 17,054.33
Calculations to Adjust for Option 4:				
Option 4 Lump Sum Withdrawal at Retirement			Not Applicable	$ 87,118.66
Adjusted Annual Full Retirement Annuity (adjusted for Early Retirement and Option 4)			Not applicable	$ 10,808.55
Total Annuity Calculations:				
Adjusted Annual Full Retirement Annuity (calculated above)				$ 10,808.55
X Cost of Life Annuity Factor			X 13.9484	X 13.9484
Present Value of Account (as of 12/31/83):			$317,174.20	$150,761.96*

* Adjusted Present Value (After Option 4 Withdrawal)

Full study of the foregoing example leads unavoidably to the conclusion that the changes effected by the 1974 Code, regardless of the options elected, constitute a net detriment to the employee, even when the aforementioned reduction of contributions and other revisions are also taken into consideration. We conclude that the result is a constitutionally impermissible impairment of the contract into which an employee has entered by becoming a member of the fund upon employment. Although the employee must expect the governmental fund to function as a trustworthy fiduciary, with respect to the investment and management of the fund as well as with respect to revision of its terms, the unilateral effectuation of the changes well summarized in the foregoing example cannot reasonably be regarded as within the expectation of the employee as contracting party.

Judicial Compensation Clause

In considering further the issue of the judicial compensation clause, that important provision of the constitution essential to protect the independence of the judicial branch, *Firing v. Kephart*, 466 Pa. 560, 568, 353 A.2d 833, 837 (1970), we necessarily must begin by noting the language of the clause. It reads:

> Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.

Pa. Const. art. V, §16(a). The standard thus expressed is, in one sense, more measurable than the rule of reason which our Supreme Court has expressed under the contract impairment clause. When we consider whether or not the compensation of a member of the judiciary has been diminished under the compen-

sation clause, we necessarily must give our primary attention to those factors which are quantifiable in dollars because it is in dollars that compensation, including pension benefits, is paid or credited and is to be measured.

As the foregoing Example 1A affirms, the effect of the 1974 Code is a measurable reduction in compensation.

Of course, the express exception in the constitutional clause exempts from its condemnation any compensation diminution which by law applies "generally to all salaried officers of the Commonwealth." Thus the test indeed is whether or not the General Assembly has "singled out the judiciary for either a direct or an indirect reduction in compensation." *Kremer v. Barbieri*, 48 Pa. Commonwealth Ct. 557, 568, 411 A.2d 558, 563, *aff'd* 490 Pa. 444, 417 A.2d 121 (1980). Although the 1979 Code reduced multipliers for the legislature, as well as for the judiciary, 71 Pa. C. S. §5102, there was no comparable reduction with respect to members of the executive branch. We cannot be persuaded by the argument of the defendant board that we should ignore that point on the ground that executive branch pension computations were never enhanced by class-of-service multipliers. That contention places form over substance and means over results; the constitutional provision does not confine itself to diminution of compensation by like means. As pointed out by the evidence before us, there was a diminution of compensation with respect to the plaintiff judges. The defendant board directs our attention to no diminution of executive branch compensation by any means.

We therefore conclude that, with respect to these plaintiffs and others similarly situated, the questioned 1974 changes are constitutionally barred from being operative. Because all of the plaintiffs are in the course of elective terms, there is no need to determine

whether the concept of "terms of office" in article V, §16(a) embraces for this purpose any term other than the ten-year elective terms involved in this case.

Contributions

We conclude by recognizing, without here deciding, the important issue which necessarily remains—whether a party entitled to receive benefits under the 1959 Code must also make the contributions required by that Code, at a higher level than the reduced contributions requirement of the 1974 Code. As was true in *McKenna v. State Emplolyees' Retirement Board*, 64 Pa. Commonwealth Ct. 269, 439 A.2d 1306 (1982), the contributions issue has not been presented, analyzed or adequately covered in this litigation. That issue is separately before this court in *State Employees' Retirement Board v. McKenna*, 621 C.D. 1982, now pending, with which the Supreme Court on September 20, 1982, has consolidated the board's appeal from that *McKenna* decision at 64 Pa. Commonwealth Ct. 269, 439 A.2d 1306.

As we noted at the outset, the motion for summary judgment here seeks only recalculation of the benefits of the plaintiffs; the granting of plaintiffs' motion for summary judgment in accordance with this opinion does not require any payment of benefits. Therefore, the issue with respect to the obligation for contributions will be taken up in its proper place.

Conclusion

For the foregoing reasons, the plaintiffs' motion for summary judgment will be granted.

ORDER

Now, January 27, 1983, plaintiffs' Motion for Summary Judgment is granted.

President Judge CRUMLISH, and Judges ROGERS, WILLIAMS and DOYLE did not participate in the decision in this case.